Tall Pines Inn, Inc. *and* Hotel and Restaurant Employees & Bartenders International Union, Local 54, AFL-CIO. Case 4-CA-12526

29 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 13 September 1982 Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Tall Pines Inn, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge: This case was heard before me in Philadelphia, Pennsylvania, on May 24 and 25, 1982, pursuant to a charge filed on October 30, 1981, and a complaint issued on December 11, 1981. The complaint alleges that Respondent Tall Pines Inn, Inc., violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), by soliciting employee grievances and complaints, and promising improved working conditions, in order to discourage employee support for the Hotel and Restaurant Employees & Bartenders International Union, Local 54, AFL-CIO (the Union); and violated Section 8(a)(3) and (1) by discharging 11 employees to discourage union activity. The complaint further alleges that a majority of the Respondent's employees in an appropriate unit designated the Union as their bargaining representative; and that the Respondent's admitted refusal to bargain with the Union violated Section 8(a)(5). Also, the complaint alleges that a strike among the Respondent's employee was an unfair labor practice strike because it was caused by the allegedly unlawful discharges. By way of relief, counsel for the General Counsel (the General Counsel) seeks, inter alia, a bargaining order and an order requiring the reinstatement of the strikers on request.

The record made before me on May 24-25, 1982, includes the record made on April 12, 13, and 14, 1982, before the United States District Court for the District of New Jersey, in a proceeding under Section 10(j) of the Act. On August 6, 1982, the district court issued an opinion finding appropriate, pending final Board determination on the merits, an injunction preventing the Respondent from discharging or otherwise disciplining its employees because they support or engage in union organizational activity, and requiring the Respondent to offer unconditional, immediate, and full reinstatement to the 11 alleged discriminatees named in the instant complaint. On August 16, 1982, the court issued an injunction, effective for 6 months from the date of its issuance, which restrained the Respondent from discharging or otherwise discriminating against employees for union activity, and from failing or refusing to offer the 11 alleged discriminatees immediate and full reinstatement. *Hirsch v. Tall Pines Inn*, Civil Action No. 82-0477.[1] On the basis of the entire record,[2] including the demeanor of those witnesses who testified before me, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following

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[1] The Respondent asserts that the judge's resolutions of credibility, findings of fact, and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, it is the Board's established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In light of the judge's finding that employee Milchanoski was discharged prior to the commencement of the unfair labor practice strike, Chairman Dotson and Member Hunter find it unnecessary to rely on *Abilities & Goodwill*, 241 NLRB 27 (1979), enf. denied 612 F.2d 6 (1st Cir. 1979).

Additionally, in tallying the number of authorization cards signed by unit employees, the judge included the card signed by Mario Pavone. The Respondent excepted, arguing that Pavone's testimony indicates that this supervisor pressured him to sign the card. As the Union had attained cards from 42 out of 66 unit employees excluding Pavone's card, it is unnecessary to rely on Pavone's card in establishing the Union's majority status.

[3] In her remedy, the judge provided for a 5-day grace period after an unfair labor practice striker applies for reinstatement before the obligation attaches to the Respondent to offer such a striker reinstatement. The Board has found that the 5-day period is a reasonable accommodation between the interests of the employees in returning to work as quickly as possible and the employer's need to effectuate that return in an orderly manner. *Drug Package Co.*, 228 NLRB 108 (1977). However, we hereby modify the judge's remedy to provide that, if the Respondent herein has already rejected, or hereafter rejects, unduly delays, or ignores any unconditional offer to return to work, or attaches unlawful conditions to its offer of reinstatement, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work. *Newport News Shipbuilding & Dry Dock Co.*, 236 NLRB 1637, 1638 (1978). See also *Joe & Dodie's Tavern*, 254 NLRB 401 fn. 3 (1981).

[1] No contention is made that the district court's determination constitutes res adjudicata with respect to any matters presented in the instant proceeding. *NLRB v. Acker Industries*, 460 F.2d 649, 651-652 (10th Cir. 1972).

[2] The record is hereby clarified to show that G.C. Exhs. 35A, 46, and 47 were received in evidence.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a New Jersey corporation engaged in the operation of a restaurant facility in Sewell, New Jersey, known as the Tall Pines Inn. During the year preceding the issuance of the complaint, the Respondent's gross revenues exceeded $500,000, and the Respondent purchased and received products valued in excess of $15,000 directly from points outside New Jersey. I find that, as the Respondent admits, the Respondent is engaged in commerce within the Act, and that exercise of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The main floor of the Respondent's establishment contains a kitchen, an a la carte restaurant called the Peacock Room, a lobby bar, and four banquet rooms—the Saxony Room (which contains a bar), the Madeira Room, the New Madeira Room, and the Madeira III Room.[3] On the lower level are another banquet room (the 19th Hole) and the Respondent's offices.

Until March 27, 1981,[4] the Respondent operated under different management from that involved in this action. On that date, the Respondent was taken over by a new group of six owners who now constitute the Respondent's board of directors. Of these six directors, five had no experience at all in operating a restaurant. The sixth, John L. Brand III, was a specialist in golf operations, but had operated a sandwich service at a golf course he owns in New York. After March 27, Brand acted as the Respondent's general manager with general supervisory responsibilities for the day-to-day operation of all the functions of the organization.

Shortly after the change in ownership, the Respondent retained a consulting firm, Hospitality Enterprises, to take charge of the Respondent's food and beverage functions. Sometime in August, the Respondent transferred Immaculate Stewart from its accounting office to the job of banquet manager.

Over timely objection on hearsay grounds, Stewart testified at the 10(j) hearing that, in early August, Ivy Rathbone told her that Brand "was dead set against unions and there is no way that it would ever come into Tall Pines." Rathbone was admittedly a supervisor at the time of that hearing and of the hearing before me, but was not called to testify. Brand, who was an owner/director and the Respondent's general manager at all relevant times, testified at both hearings, but was not asked about this matter. In a stipulation received into evidence at the outset of the 10(j) proceeding (whose record the parties offered into evidence at the outset of the hearing before me), the Respondent stipulated that Rathbone was a supervisor "at all times material herein."[5] After becoming a supervisor, Rathbone had the job title of office manager. It is unclear whether, at the time this remark was made, Stewart was supervised by her or had herself assumed the supervisory job of banquet manager. Late in the first day of the 10(j) hearing, the Respondent's counsel stated that he did not know whether Rathbone was a supervisor at the time this conversation took place, and Brand stated (but did not testify) that she became a supervisor on an unspecified date before September. There is no other record evidence as to when Rathbone became a supervisor and, the following colloquy aside, the Respondent made no effort to withdraw from the stipulation or to exclude it from the record before me. Under the circumstances, I find that Rathbone was a supervisor when she made these remarks, and that they are probative of the truth of the contents. *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 532 (3d Cir. 1976), cert. denied 429 U.S. 825 (1976); *Joseph T. Ryerson & Son, Inc. v. H. A. Crane & Bro., Inc.*, 417 F.2d 1263, 1269–71 (3d Cir. 1969).

During the summer of 1981, the Respondent suffered losses which in July and August escalated to $50,000 a month. During this period, the Respondent became dissatisfied with Hospitality Enterprises' services. On September 12, the board of directors hired Thomas DeAngelo, an experienced restaurant manager, to take charge of the Respondent's food and beverage operation. After a transitional period during which Hospitality Enterprises continued to perform some management functions but others were performed by DeAngelo, he took over complete control on October 4. DeAngelo's entire previous experience had been with nonunion shops.

The Respondent follows the practice of submitting to its banquet customers a bill with an item which at all relevant times was specified as a gratuity for the waitresses and bartenders of 15 percent of the price of the food and beverages consumed. Until late September, the waitresses and bartenders in fact received the entire amount described as a gratuity. About late September, the Respondent decided to give the waitresses and bartenders only 80 percent of this sum (amounting to 12 percent of the price of the food and beverages) and to keep the rest of the "gratuity" itself. On September 29, DeAngelo advised about three bartenders, including alleged discriminatee John Rajczy, of this cut in their gratuity. DeAngelo also accused them of having stolen in the past. Rajczy, who for 14 years had been holding down a full-time job as a mathematics and economics teacher in a public high school, became very upset.[6] He said that, if that was the

[3] The Madeira Room and the New Madeira Room are separated only by a movable partition.

[4] All dates hereinafter are 1981 unless otherwise stated.

[5] This portion of the stipulation also encompassed Brand, Owner/Director/President Dr. Daniel Monaco, and A La Carte Maitre D' Andre Catalano, who assumed that post in April 1981. The stipulation goes on to state that Stewart and Thomas DeAngelo were supervisors from on or about August 1 and September 1, respectively.

[6] Part-time bartenders/alleged discriminatees Thomas Gruber, John Milchanoski, and Robert Burrough were also teachers in that school. Gruber had taught biology for 10 years, Milchanoski had been a high school physical education and health teacher and a college football coach for 11 years, and Burrough had been a teacher for 17 years. Milchanoski was not present during this meeting. The record fails to show whether Gruber and Burrough were there.

case, why had not the Respondent done something about it when it occurred. DeAngelo said, "Let's just drop that, John, it [happened] in the past, just forget about it."

B. *The Union Organizational Campaign*

About October 4 or 5, banquet waitress/alleged discriminatee Ingrid Hendriks (sometimes referred to in the record as Inky) told her boy friend, Joseph Abruzzo (sometimes referred to in the record as Chick), that the Respondent's employees were having trouble, and asked him whether there was anything they could do about it. One of Abruzzo's friends, Felix Bocchicchio, was a union representative. On October 8, Abruzzo telephoned Bocchicchio, said that the Respondent's "banquet people" were having a problem with management, and asked if the Union could help them. Bocchicchio asked if the problem involved the "banquet people" only. When Abruzzo said yes, Bocchicchio suggested that he take the matter up with the Wage and Hour Bureau. Bocchicchio said that the Union could help them only if the "whole house" was interested in unionizing; asked whether they would be interested in signing union authorization cards; and said that, if such cards were signed, they could be used to petition the NLRB to represent them. Bocchicchio asked Abruzzo to find out if the "whole house" was interested in having union representation, and then to "get back to" Bocchicchio.

On the following day, Abruzzo telephoned Bocchicchio that a number of employees had said they would sign authorization cards. Bocchicchio told him to come down to the union office, pick up some cards, and give them to the Respondent's employees. That same day, Abruzzo obtained such cards at the union office. Also on October 9, Abruzzo gave Hendriks several cards and told her that, if anyone wanted the Union to represent him, have him sign the card. Hendriks divided the cards with banquet waitress/alleged discriminatee Kathleen Walker, who was also present. That same day, Abruzzo walked into the office of Brand, a personal friend, and asked whether he knew what was "coming down" in the meeting, scheduled for October 10, when the banquet waitresses were to be advised of the cut in their gratuity. Brand replied, "Yes, Chick, it's been coming for a long time, we've held it off for a long time." Abruzzo asked, "What are you going to do if the girls go to a union?" Brand replied, "Chick, I honestly don't know."

Alleged discriminatees Hendriks and Cindee Rees testified at the 10(j) hearing that on the evening of Thursday, October 8, after they had finished working on a banquet that evening and while they were setting up for a breakfast banquet the following morning in the Saxony Room, they conducted a loud-voiced conversation about the Union in earshot of the Respondent's owners, who were conducting their weekly meeting nearby in the Saxony Bar. Rees' timecard shows that she did not work on Thursday, October 8. Moreover, the Respondent's written banquet schedule for the week fails to show a breakfast scheduled for the morning of October 9. Accordingly, I do not accept these employees' testimony about this alleged conversation.

On or about the week of October 5, as banquet bartender/alleged discriminatee Gruber was working in the "19th Hole" banquet roon, Hendriks asked him in the presence of employee Kathleen Walker if he would be interested in joining the Union. He replied that he would like to know more about it first. Sometime during that same week, Gruber remarked to banquet bartenders/alleged discriminatees Burrough and Rajczy, while all three were in the Saxony Room, that Gruber had heard something about the Union's coming into the Respondent's establishment.

On the morning of October 10, employee Rees asked DeAngelo whether the Respondent's recent help-wanted newspaper advertisement seeking full-time banquet help meant that the present employees were going to be fired. He replied no, that the Respondent was going to need a lot of extra help for the banquet season.[7] That evening, the Respondent held a meeting of all the banquet waitresses then on duty. DeAngelo announced the 20-percent cut in the waitresses' gratuities. DeAngelo described his conversation earlier that morning with Rees, and assured the employees that they were not going to be fired. General Manager Brand said that he was sorry about the gratuity cut but that it was compelled by the Respondent's financial condition. He said that, in order to improve business, he wanted one banquet waitress to be scheduled for every 25 to 30 patrons. None of the waitresses expressed any opposition to this ratio. The waitresses asked Brand if he was satisfied with them. He said that the waitresses were the best crew that he and the Respondent had ever had.

A few days later, about 7:30 p.m. on October 14, DeAngelo was advised that the banquet waitresses would like to see him. He went to the kitchen area, where he met with Hendriks, Kathleen Walker, and Rees. Rees berated DeAngelo about the nonappearance of the patrons who were scheduled to attend the Cuccinotta banquet, estimated at 16 to 20 guests, at 7 that evening. DeAngelo said that their failure to show up was not his fault. Rees said that in the past, when management "made a mistake" the employees had been paid showup pay. DeAngelo said that the waitresses had not come in for nothing, because they could work at the three other banquets scheduled for that evening.[8] DeAngelo further remarked, "Maybe that's why Tall Pines is in the financial condition they are today." The waitresses then went on to work. A copy of the Respondent's banquet schedule, on which Brand made noncontemporaneous notations relating to waitress scheduling, contains in connection with the Cuccinotta dinner the undated notation in an unidentified hand, "Nasty and Rude/C. Rees—expected to be paid for not/working a party/that banquet mgr/had not followed/up on."

On October 11, a card was signed by busboy Andrew Catalano. He resided and drove home from work about 3 days a week with his father, Andre Catalano, who was

[7] Similarly, DeAngelo testified at the 10(j) proceeding that his interviewing in connection with this advertisement was to obtain employees to supplement the existing work force.

[8] The Cuccinotta dinner had been set for the same 7 p.m. hour as a Rotary Club dinner estimated to consist of 40 to 50 patrons. A Heart Association banquet, estimated to consist of 16 to 20 patrons, was scheduled for 7:15. A banquet was also scheduled for 8 p.m., with an estimated attendance of 25.

the Respondent's maitre d' in the a la carte restaurant and was stipulated to be a supervisor. On October 15, Maitre D' Catalano came into the kitchen while a discussion of the October 12 union meeting and the card-signing was being conducted among alleged discriminatees Rees, Robert DiPonziano, and Susan LaBounty. Banquet waitress LaBounty did not know Catalano, who did not supervise banquet waitresses and seldom went into the banquet area.[9] She asked, "Are you one of us, are you part of us?" He replied, "I only listen but I'm with you." When leaving the conversation, Catalano walked away with DiPonziano, put his arm around him, and told him, "We've got to stick together."

My findings as to the October 15 incident are based on the testimony of LaBounty, who testified before me and at the 10(j) hearing, and DiPonziano, who testified at the 10(j) hearing only. Catalano did not testify before me. He testified at the 10(j) hearing that LaBounty "may have said, 'Are you with us,' but I don't know what it was pertaining to'"; and that "if" he told Rees and LaBounty that he was in fact with them, "it wasn't pertaining to a union movement. I didn't know what she was talking about." He further testified that the first time he heard about the existence of a union movement was on October 20 when the Respondent received the Union's October 19 letter requesting recognition. In short, Catalano admitted that he may have made some of the remarks attributed to him by LaBounty. Moreover, Catalano's testimony that any remarks that he was "with" the employees were made without knowing what they were talking about seems highly improbable, and his further testimony that his son told him nothing about the Union seems rather unlikely. Although LaBounty's recollection of the incident during her May 24 testimony before me was less specific than her April 24 10(j) testimony, her demeanor impressed me favorably. Accordingly, I credit her and DiPonziano over Andre Catalano.

From October 10 to 17, DeAngelo worked about 70 hours, during which he moved around the entire restaurant/bar operation. He testified that his responsibilities included to see new problems that were developing and correct them right away, that he was "very proud" of how he performed as manager, and that he was "on top of things." On October 10 and 11, alleged discriminatee Hendriks gave out about 15 cards to employees all over the Respondent's premises, including the kitchen and the "19th Hole." She distributed these cards to waitresses, kitchen personnel, dishwashers, and cooks. On October 10, in the Saxony Bar area, Abruzzo gave a card to alleged discriminatee Burrough and asked him to sign it. Later that day, Burrough gave a blank card to employee Karen Kay Aldrich in the hallway between the dining room and the kitchen. Still later that day, Burrough, Aldrich, and employee Inta Kimanskis sat down together at a table in the banquet room. All three signed cards there. On October 11, in the hallway adjoining the kitchen and the Peacock Room, alleged discriminatee Rees gave cards to several waiters and asked them to sign. They immediately signed cards and returned them to her.[10] About October 12, Burrough gave a blank card to employee James Pagano at the service bar in the lobby; Pagano signed the card a day or so later. Apparently on October 12, alleged discriminatee DiPonziano signed a union card while in the kitchen by the coffee urn next to the Madeira Room. During the week preceding his October 20 discharge, he had about five conversations with employees, throughout the kitchen, regarding whether management knew about the employees' union activities. On October 14, Hendriks, Rees, and DiCintio engaged in a discussion of the Union in the Madeira Room, a banquet room which was empty at that hour and which a la carte waiter DiCintio rarely frequented. While the employees were discussing such matters as the number of employees who had signed and would sign union cards, DeAngelo repeatedly entered the room and walked within 2 or 3 feet of them. During his second visit about a minute after his first visit, he gave what DiCintio testimonially described as a "funny" look. DiCintio thereupon said to the other employees, "I think he knows."

On October 12, a union meeting was held at Hendriks' house. Before the meeting began, Abruzzo gave Bocchicchio at least 35 signed authorization cards. During that meeting, cards were signed by other employees, mostly unidentified in the record.

C. *The October 15 Board of Directors' Meeting*

The minutes of the meeting of the Respondent's board of directors (who included John Brand and Dr. Monaco) held in the evening of October 15 state, in the handwriting of the board's secretary, "Full time employees in banquet area John or Tom to discuss.[11] Banquet manager and bartenders in colusion [sic], bad situation, part-time." By this time, union cards had been signed by Banquet Manager Stewart and by part-time bartenders (all alleged discriminatees) Burrough, Rajczy, Milchanoski, and Gruber.[12] Also, the October 12 union meeting had been attended by (inter alia) Stewart, Burrough, and Rajczy.

About 5 p.m. on October 17, part-time bartender Gruber, who had just finished his tour of duty, asked DeAngelo for Gruber's schedule the following week. DeAngelo showed Gruber the schedule, which included assignments for Gruber, Burrough, and Rajczy. DeAngelo went on to say that Gruber would be working three jobs that week, and that Burrough or Rajczy could help him with his October 24 assignment.

Later that evening, as Gruber was leaving the premises, he saw Brand and Dr. Monaco conversing close to each other and very quietly, and looking a little distressed. Brand and Dr. Monaco ended their conversation, whereupon Gruber bade them good night. Dr. Monaco

[9] At this time, Catalano had been maitre d' for about 6 months.

[10] My findings in these two sentences are based on Rees' testimony before me (see infra part II,N,2,a). However, she testified at the 10(j) proceeding that for fear of discharge she made a point of not talking about the Union when members of management were around.

[11] As previously noted, the Respondent's day-to-day operations were then supervised by John Brand and Thomas DeAngelo.

[12] As described infra, the cards of Milchanoski and Gruber were signed on their behalf by Rajczy.

said nothing, and Brand, who seemed a "little bit upset about something," just grunted. Normally, Brand was extremely friendly.[13]

D. *The Alleged October 18 Discriminatory Discharges*

At an undisclosed hour between 11 p.m. on October 17 and 9 a.m. on Sunday, October 18 (perhaps at 1 a.m. on October 18), General Manager Brand telephoned Dr. Monaco, said that DeAngelo wanted to "fire the girls," and asked Dr. Monaco to come to the Respondent's office. Upon Dr. Monaco's arrival about 10 a.m. on October 18, he and Brand conferred with DeAngelo. During this conference, they all agreed to discharge alleged discriminatees Hendriks, Komine, LaBounty, Rees, Caryll Tighe, and Kathleen Walker (all banquet waitresses) and Burrough, Gruber, and Rajczy (all part-time bartenders). Dr. Monaco obtained the telephoned approval of fellow Owners/Directors John Sori and Bud Domer.[14] Brand then instructed DeAngelo to telephone all of these employees and advise them that they were terminated. That same day, DeAngelo reached all the banquet waitresses except LaBounty, and gave them this message. When Hendriks (who had worked for the Respondent for more than 9 years) asked why she was being terminated, he said, "we're just not happy with the quality of your work." She asked whether he had anything more specific to tell her, and he said no. She asked whether she was the only one fired, and he said no. He said nothing about scheduling.

DeAngelo telephoned LaBounty's home on two occasions on October 18, but on both occasions he was advised that she was not at home. There is no evidence or claim that he left her a discharge message. He testified that he would have so advised her if he had been able to reach her. Later that afternoon, while LaBounty was at a friend's house, LaBounty's mother advised her by telephone about DeAngelo's calls. LaBounty testified that a telephone call from DeAngelo was "very interesting" because he would not ordinarily have had any reason to call her. When she returned home a little later, she received a message that Kathleen Walker had telephoned to say that all the banquet waitresses had been fired. LaBounty then telephoned Walker, who told her that Walker had been so advised during a telephone call from DeAngelo. LaBounty's name did not appear on the schedule (posted on October 17) for October 19–25. She had been alerted on October 17 to the possibility that she would work at the Makos-Trianso wedding reception on October 25, but did not telephone the Respondent that week to find out whether she was in fact assigned to that affair. Nor did the Respondent attempt (so far as the record shows) to get in touch with her after October 18. No banquets were scheduled for October 26. About October 28, after the Union had set up a picket line at the Respondent's establishment (see infra), LaBounty telephoned Brand and asked him whether anyone had telephoned her home on October 18. He said no. She asked what her status was. He asked whether she would come back to work. She said that she understood that everyone was out on a picket line and she would have to consider crossing it to come back to work. Thereafter, she never tried to advise the Respondent that she was willing to come back to work. I conclude that LaBounty was discharged on October 18. *NLRB v. Downslope Industries*, 676 F.2d 1114, 1118 (Steadman) (6th Cir. 1982); *Dee Knitting Mills*, 214 NLRB 1041, 1042 (1974), enfd. 538 F.2d 312 (2d Cir. 1975); *Martin Arsham Sewing Co.*, 244 NLRB 918 (1979); *Para-Chem Southern, Inc.*, 260 NLRB 1031 (1982).

Also on October 18, DeAngelo telephoned part-time bartenders Burrough, Rajczy, and Gruber, and told them that they were discharged. Rajczy said that this was bad news, because his wife was pregnant and he needed the extra income very badly. DeAngelo told Burrough that the Respondent had decided to go to full-time bartenders. Burrough said that the Respondent was "crazy," that there was not enough work for full-time bartenders. On October 8, when Burrough had asked DeAngelo whether the Respondent was planning on getting rid of its banquet waitresses and bartenders, DeAngelo had told him that all their jobs were secure, and Burrough could punch or kick DeAngelo if they were not. During the October 18 discharge interview, Burrough asked DeAngelo if his October 8 offer was "still stood." DeAngelo said that Burrough could come in if he wanted to.

E. *The Union's October 19 Bargaining Demand and Representation Petition*

By certified letter dated October 19 and received by the Respondent on October 20, union counsel stated that the Union enjoyed majority status in a unit consisting of "all waiters, waitresses, bartenders, dishwashers, pantry employees, cooks, busboys, cashiers, stewards and banquet employees, including banquet manager, steady extras and hostesses." The letter requested a meeting to demonstrate that status and commence bargaining for a collective agreement. Also on October 19, the Union filed with the Board's Regional Office a representation petition seeking an election in that unit, excluding "All other employees, guards and supervisors as defined in the Act." That petition was accompanied by 47 authorization cards.

Meanwhile, no later than the morning of Monday, October 19 (see infra, fn. 15), union business agent Bocchiccio telephoned Owner/Director Sori and asked him to set up a meeting with the Respondent's owners at which the Union could tell them that a "vast majority" of the employees had signed union cards. Later that day (see infra, fn. 15), Sori telephoned Dr. Monaco. Sori said that Bocchicchio had called him that morning and said that "we have your house and why don't you sit down and talk to us and give us a letter of recognition and . . . we will cut you a good deal." Sori further said that he was

[13] My findings in this paragraph are based on Gruber's testimony before me and at the 10(j) hearing. Dr. Monaco did not testify before me and, at the hearing before me, Brand was not asked about this matter. At the 10(j) hearing, neither Brand nor Dr. Monaco was asked whether they had conferred at the time and place specified by Gruber. However, both of them in effect denied that they discussed the October 18 termination as early as 5:30 p.m. on October 17. Gruber's demeanor impressed me favorably, and I credit his testimony as to this incident.

[14] Dr. Monaco was unsuccessful in his efforts to reach the remaining owner/director, Sharp.

"upset" by this request.[15] Dr. Monaco told Sori that he was also "upset" by Bocchicchio's request. Dr. Monaco testified that he was "upset" because he owned a restaurant, the presence of a union meant that "you lose a certain amount of control" and "I'm sure there had to be a financial burden to the inn," and because the Union was "not one of the better unions to go with." Sori asked whether Dr. Monaco wanted to meet with the Union. Dr. Monaco said that he would check with the Respondent's house attorney, who advised him that it was all right to talk to the union representatives "as long as it's unofficial." A meeting was set up for 8 p.m., Monday, October 19.

At that meeting, the Union was represented by Bocchicchio, Union Vice President Al Didone, and business agent Rocco Marindino. The Respondent was represented by Sori and Dr. Monaco. Bocchicchio said that a majority of the Respondent's employees had signed union cards, and asked the Respondent to sign a letter of recognition. Dr. Monaco asked, "How do we know that these individuals are our people?" Didone said, "Well, you tell me."

At that point, Dr. Monaco reached for an envelope which the Union had brought to the meeting, and which contained photostatic copies of the union cards. He went through them and gave them to Sori, who also went through them. Dr. Monaco expressed surprise at the identity of a few employees who signed cards, and as to one employee (unidentified in the record) commented, "Even this little [scatological expression] signed one." Then, Dr. Monaco said that he felt that the Respondent could not have a union. Bocchicchio said that the Union was not designed to destroy a company financially, but merely wanted to set up guidelines and job classifications and representation. Dr. Monaco asked if the Union "could go away for a year or two." The Union said that it could not. Then, referring to the banquet waitresses and bartenders who had been discharged on October 18, Bocchicchio said, "Who in their right mind knowing that they had signed union cards would dismiss these people?" Dr. Monaco said, "the managenent did." Bocchicchio and Didone said, "Well, then you should have fired the management." Dr. Monaco said, "I am the management."

Dr. Monaco said that he would call Didone on Monday, October 26, and give him an answer. The meeting then broke up.

F. *The Alleged Discriminatory Discharge of DiPonziano*

On the basis of events summarized infra, part II,M, Banquet Manager Stewart remarked to DiPonziano, on the evening of October 20, that it looked to her as if Nancy DeAngelo, the wife of the Respondent's food and beverage manager, was going to become the new banquet manager. DiPonziano said that he would ask Food and Beverage Manager Thomas DeAngelo what was happening.

DiPonziano and Thomas DeAngelo testified at the 10(j) hearing, but not at the hearing before me. They both testified that, during a conversation on October 20 in the presence of Office Manager Ivy Rathbone,[16] DiPonziano referred to the October 18 discharge of banquet waitresses and then said that he understood that Stewart was to be discharged also, to which DeAngelo replied yes. Both men also testified that DiPonziano further said that he understood that he also was to be discharged. DeAngelo testified that he told DiPonziano that he was to be replaced, without giving any particular date. DeAngelo testified, in effect, that before he made this statement the entire conversation was limited to the matters described in the two foregoing sentences. At the 10(j) hearing, Banquet Manager Stewart testified, without corroboration from DiPonziano, that he told her that according to DeAngelo, Stewart and DiPonziano were supposed to train the new waitresses for the rest of the week, that they could stay until Sunday if they wished or could finish out that night, but that as of Sunday they were terminated (see infra, fn. 18). She further testified at the 10(j) hearing without contradiction that she thereupon went to DeAngelo and asked whether what DiPonziano said was true and DeAngelo said that it was. Stewart then cleaned out her desk and turned in her keys. It is undenied that after the DiPonziano-DeAngelo conversation, DiPonziano "did another run through the banquets" and then told Rathbone that he did not feel very well under the present circumstances and was leaving for the night. Stewart and DiPonziano left the premises together about 7 p.m. while two banquets were still in progress. DiPonziano did not thereafter work for the Respondent.[17]

As to the October 20 DiPonziano-Thomas DeAngelo conversation, DiPonziano testified as follows: DiPonziano asked DeAngelo what was going on, and DeAngelo replied that he did not know what DiPonziano was talking about. DiPonziano said that he had received a telephone call from one of the waitresses saying that he had been aware that they were going to be let go. DeAngelo said, and DiPonziano agreed, that this was not true. DiPonziano asked why the waitresses had been let go. DeAngelo said that he had kept on seeing the waitresses sitting down in the dining rooms or cooking their own breakfast in the kitchen, and had kept on seeing dirty tray racks in the dining room. DeAngelo further said that in the morning, he always had to be the first one to say hello. He said nothing about underscheduling. DiPonziano asked why the bartenders had been let go. DeAngelo said that the Respondent had decided to "go with" full-time bartenders. DiPonziano said that the Respondent did not have enough work for full-time bartenders. DeAngelo said that they could also be used for maintenance and cleanup. DiPonziano expressed doubt that the Respondent could find bartenders who

[15] Sori did not testify. Bocchicchio testified on direct examination that his conversation with Sori took place on Wednesday, October 14. On cross-examination, he testified that the conversation took place on October 19. On August 13, 1982, the Respondent and counsel for the General Counsel entered into a stipulation that the conversation took place on October 19. The Union was not a party to the stipulation.

[16] DeAngelo referred to her as "bookkeeper Ivy Stewart."

[17] The Regional Office thereafter dismissed, on the ground that Stewart was a supervisor, that part of a charge alleging that her discharge violated Sec. 8(a)(3) of the Act.

would be willing to do this. DeAngelo shrugged. DiPonziano said that he had heard that he and Stewart were going to be terminated after training the new waitresses. DeAngelo said that Sunday, October 25, was DiPonziano's last day. DiPonziano said that he was not leaving until he was "officially fired." DeAngelo told him that October 25 was "officially his" last day, but he could make that very night, October 20, his last night if he wished. DiPonziano said that he did not understand this, that 2 weeks earlier he had been offered a full-time job as banquet manager. In response, DeAngelo merely shrugged.

I credit the testimony of DiPonziano summarized in the preceding paragraph. Thus, Thomas DeAngelo in effect denied that DiPonziano asked why the Respondent wanted to get rid of him, although the inherent probability of such an inquiry is augmented by DeAngelo's admitted action 2 weeks earlier in offering DiPonziano Stewart's job as banquet manager (see infra, part II,M). Indeed, DeAngelo testified that he had no problems with DiPonziano's work, and never did explain the Respondent's admitted decision to replace him. Moreover, Supervisor Rathbone, who was admittedly present during the conversation, was not called as a witness. Furthermore, DiPonziano's version of the conversation gains some support from Stewart's testimony regarding her subsequent conversations with him and DeAngelo.[18] Moreover, I conclude from DiPonziano's credited testimony that he was discharged on October 20. *Western Clinical Laboratory*, 225 NLRB 725, 746 (1976), enfd. in part and remanded in part 571 F.2d 457 (9th Cir. 1978), decision on remand 242 NLRB 92 (1979), enfd. mem. 633 F.2d 225 (9th Cir. 1980); *RJR Communications, Inc.*, 248 NLRB 920, 936 (1980).

G. *Alleged Independent Interference, Restraint, and Coercion*

Also on October 20, Supervisor Andre Catalano, the maitre d' over the a la carte dining room, told waiter DiCintio that the Union was no good, that he himself had once been a shop steward, and that "they were a bunch of cutthroats," and that the Union would not help the employees out because his son had been fired from a union house and "they didn't represent him." Catalano said that he did not know why the waitresses had been fired, and that the waiters' jobs were secure. DiCincio said that he did not believe Catalano, and that if the Respondent could fire a whole crew at once the waiters could be next.

On the following day, during a Catalano-Dr. Monaco conversation within sight but not earshot of DiCintio, Catalano asked if DiCintio could speak to Dr. Monaco, who said, "Certainly." Then, Catalano told DiCintio that Dr. Monaco had said the waiters' jobs were secure and Catalano had control over hiring and firing in the a la carte dining room. Catalano said that DiCintio could talk to Dr. Monaco if he liked.

DiCintio thereupon approached Dr. Monaco and asked to talk to him. Dr. Monaco agreed, and they sat down on the couch in the lobby. Dr. Monaco asked what the problem was. DiCintio said that the waiters in the Peacock Room were upset and nervous because a number of employees had been discharged a few days earlier and the Peacock Room waiters thought they would be next. Dr. Monaco said that the board of directors had nothing to do with the Peacock Room, that "we have no problem in the Peacock Room," that Catalano did all the hiring and firing for the Peacock Room, and that the Peacock Room employees' jobs were secure. Dr. Monaco said that the only reason the waitresses and bartenders had been fired was that the waitresses had been underscheduling for banquets and the bartenders had been stealing. Dr. Monaco asked whether there were any other problems. DiCintio said that DeAngelo had been "coming down on them real hard" and had imposed "crazy rules" such as excluding employees from the premises on their nights off, forbidding them to change clothes in the locker rooms, and requiring them to eat dinner off the timeclock. DiCintio said that DeAngelo had been "making life miserable for them." Dr. Monaco said that he would tell DeAngelo to "take the heat off them." He further said that he had not known about any of the rules, and said, "Make up a list and I'll change them." He asked what else the Peacock Room waiters needed to be happy, and said that if they needed anything else he would take care of it. DiCintio said that the waiters were in great need of more cooking pans, which they used to prepare certain dishes in the presence of seated patrons. Dr. Monaco said that he would get more pans. Dr. Monaco said that he knew "the boys" were upset, and asked DiCintio to assure them that the Respondent would do everything to make everybody happy. Dr. Monaco said, "If you need anything, just come and ask me."[19]

Then, Dr. Monaco said that he knew that DiCintio, a waiter captain (not claimed to be a supervisory position), was one of the leaders in the dining room. Dr. Monaco further said that he would appreciate anything that DiCintio could do to take the "union pressure" off. Dr. Monaco stated that the Union could "kill us" because some investors who intended to build condominiums on the Respondent's property might change their minds if they got wind of the Union.[20]

Two days later, the waiters received the cooking pans, for which DiCintio had asked Catalano a number of times. Later that same evening, when walking past Di-

[18] The Respondent withdrew a timely objection, on hearsay grounds, to Stewart's testimony about DiPonziano's report to her regarding DeAngelo's remarks. See *American Rubber Products Corp. v. NLRB*, 214 F.2d 47, 52-53 (7th Cir. 1954). In any event, such testimony might well be receivable, to prove the truth of the contents, under Fed.R.Evid 801(a)(1)(B). *U.S. v. Lanier*, 578 F.2d 1246, 1255-56 (8th Cir. 1978), cert. denied 439 U.S. 856 (1978).

[19] My findings in this paragraph are based on a composite of credible parts of the testimony of Dr. Monaco and DiCintio, which as to these matters is not in material conflict.

[20] My findings in this paragraph are based on DiCintio's testimony at the 10(j) hearing and at the hearing before me. I do not accept Dr. Monaco's denial that the Union was mentioned during this conversation. DiCintio's testimony before me was substantially the same as his 10(j) testimony, and his demeanor impressed me favorably. Dr. Monaco admittedly opposed the union movement, and he did not testify before me. Moreover, at that time, some investors were admittedly planning to build condominiums on some of the Respondent's property.

Cintio in the hall between the kitchen and the dining room, Dr. Monaco asked whether he had received the pans. When he said yes, Dr. Monaco looked at him, smiled, said "Anything you want, anything," and continued on his way. Because of his adjuration not to worry, the "pressure was off," DiCintio concluded that the new rules had been withdrawn and, accordingly, never prepared a list of the ones he had complained about.

Dr. Monaco testified that every time he saw DiCintio, which was once or twice a week, Dr. Monaco would say, "Hey, Joe, how you doing? Things going all right, anything I can do?" Dr. Monaco further testified that the foregoing October 21 conversation was the only time they had ever sat down on the couch and had a conversation.

H. *The October 22 Board of Directors' Meeting*

The minutes of the October 22 board of directors' meeting state, in the board secretary's handwriting, "Board aggress [sic] that WE WILL fight the Union ~~NOT ACCEPT~~ as BARGAINING UNIT" (crossouts in original).

I. *Alleged Discriminatee Burrough's Postdischarge Conversation with Supervisor DeAngelo*

On Saturday, October 24, Burrough returned to the Respondent's premises to clean out his locker. At this time, DeAngelo came into the locker room and asked Burrough how he was doing. Burrough expressed earthy contempt for DeAngelo's supervisors. DeAngelo said, "how come you signed a card? How come you didn't come to me first?" Burrough said, "Tom, I knew if I saw you what would happen to the people who signed the cards." DeAngelo then invited Burrough to join him for a cup of coffee after Burrough's locker was cleaned out. However, when Burrough came down for the coffee, DeAngelo was tied up on the telephone and Burrough left the premises.

My findings in the foregoing paragraph are based on Burrough's testimony before me and at the 10(j) hearing. DeAngelo did not testify before me. At the 10(j) hearing, he admitted that on this occasion he and Burrough had a conversation during which Burrough deprecated DeAngelo's superiors. However, DeAngelo denied that anything was said about the Union or cards. Burrough's demeanor impressed me favorably, and I accept his version of the conversation.

J. *The Alleged Discriminatory Discharge of Milchanoski*

For reasons discussed infra, part-time bartender Milchanoski had not actively worked for the Respondent since early September, when he began coaching football at the University of Pennsylvania. The Respondent stipulated that during the week of Sunday, October 25, 1981, it decided to discharge him. By the time he finished coaching that season, the picket line had been established. He participated in the picketing. When he asked Abruzzo whether Milchanoski had to go to the Respondent to find out whether he was discharged, Abruzzo stated that he had a "list," whose source he did not describe, of people who were fired and Milchanoski's name was on that list. Milchanoski made no effort to return to work. A stipulation received into evidence on May 24, 1982, states, inter alia, that "It is the position of Respondent that the termination of Milchanoski's employment was voluntary and was not in violation of Section 8(a)(1) and (3)."

K. *The Allegedly Unfair Labor Practice Strike*

On October 26, 30 to 40 employees attended a union meeting at Stewart's house. At that meeting, the employees asked about strike procedures. The union representatives described the pros and cons of a strike, and said that it might cause the Respondent to sign a letter of agreement with the Union. Employees expressed concern about their own job security because of discharges which the complaint alleges to be unlawful. A majority of those present voted to go out on strike because of such discharges, because of the cut in the employees' gratuity, because of the absence of job classifications, because they thought it would be a quicker way to get the Union in, and because "they just weren't happy with the situation the way it was." On the following day, October 27, 1981, 30 to 40 of the Respondent's work force went on strike. They set up a picket line with signs stating, "Tall Pines Unfair/Local 54, Hotel and Restaurant Employees." The picket line continued at full strength until late November 1981. Thereafter, fewer and fewer persons participated therein. About the end of December 1981 or the first week in January 1982, the picketing ceased altogether.

After October 27, 1981, the Union's only organizational activity was on the picket line. After November 1, 1981, the Union received no authorization cards from any of the Respondent's employees. Nor did Bocchicchio receive any expressions of support from the people who were actively working for the Respondent in April 1982. As of that date, there was no organizational drive at the Respondent's establishment.

Among the strike replacements hired by the Respondent were three banquet waitresses (two of whom wanted only short-time work) who, after they started working, told DeAngelo that they were members of an unspecified union or unions. All three crossed the Local 54 picket line. As of April 13, 1982, the second day of the 10(j) hearing, the Respondent's active employees included 15 employees who were employed before the strike and continued to work after the strike began, 9 employees who were employed before the strike but either requested reinstatement or were asked to come back and did come back, 7 new banquet waitresses (not including Banquet Manager Nancy DeAngelo), and 8 new banquet bartenders. The Respondent took back all the strikers who asked to return.

L. *The Representation Proceeding*

On October 30, the Regional Director for Region 4 issued a notice that a hearing on the representation petition would be held on November 10. As previously noted, the charge herein was also filed on October 30. On November 6, the Regional Director issued a notice

that the representation case hearing had been indefinitely postponed.

M. *Reasons Given by the Respondent for the Alleged Discriminatory Discharges on October 18*

As previously noted, DeAngelo undeniedly told Hendriks on October 18 that she was being discharged because the Respondent was not happy with her work, and said nothing about scheduling. Also, DiPonziano credibly testified that, on October 20, DeAngelo said that the banquet waitresses had been let go because he kept on seeing them sitting down in the dining rooms or cooking their own breakfast, they would not say hello to him before he said hello to them, and he kept on seeing dirty tray jacks in the dining room. Further, DiPonziano credibly testified that DeAngelo said nothing about underscheduling. Moreover, on October 10, General Manager Brand told the banquet waitresses that they were the best crew that he and the Respondent had ever had. The discharged banquet waitresses had worked for the Respondent for periods varying between 3 years (Komine) and 9 years (Hendriks). None of them had ever received any written discipline nor, so far as the record shows, any oral discipline. However, the Respondent's brief contends that the banquet waitresses were discharged because of their alleged connection with allegedly scheduling too few waitresses for the banquets, thereby causing the patrons to receive overly slow service but increasing each waitresses' proportion of the gratuity. Evidence at least allegedly bearing on this connection is summarized below.

Sometime in August, before DeAngelo became restaurant manager, the Respondent transferred Stewart from its accounting office to the job of banquet manager. On August 2, during the interview which preceded the transfer, Brand told her that he wanted her to run the banquet department. He went on to say that banquet service would be poor if too few waitresses were scheduled for a particular banquet or if banquets were being held at the same time in more than one room. As a witness for the Respondent during the 10(j) proceeding, Brand testified that during this interview he told Stewart that except for buffets he wanted her to schedule 1 waitress for every 25 to 30 patrons, and she said that she would. Brand also testified before me, but was not asked about this matter. As a witness for the Regional Director during the 10(j) hearing, Stewart denied Brand's testimony in this respect. Stewart did not testify before me. As to this matter, I see no reason to credit either one over the other (although see infra, fn. 23 and part II,0,2). Since the General Counsel bears the risk of nonpersuasion, I accept Brand's testimony as to this matter.

On September 11, Brand hired DeAngelo to take over as the Respondent's food and beverage manager. By October 4, he had full control over the operation. Immediately upon starting to work for the Respondent, DeAngelo concluded that the kitchen was overstaffed, that some of the dishwashing employees were incompetent, and that the kitchen staff was capable of doing some work which at that time was being performed by an outside cleaning service. On dates not clear in the record, DeAngelo discharged some dishwashing employees and brought in some new ones. Also, DeAngelo explained to the chef how DeAngelo wanted the schedule made, helped the chef in making the schedule, and approved it before it was posted. Moreover, in late September or early October, DeAngelo placed a classified newspaper advertisement seeking to replace the incumbent chef with a new one. Further, on an undisclosed date or dates, DeAngelo imposed rules excluding employees from the premises on their nights off, requiring employees to eat dinner off the timeclock, and forbidding them to change clothes in the locker rooms (inferentially, for the use of golf-playing patrons). In addition, in early October DeAngelo ordered $11,000 worth of new equipment for the a la carte kitchen and the banquet kitchen.

The Respondent's banquet waitress do not work a regular schedule, but report to work pursuant to a schedule posted in the kitchen every Saturday for the forthcoming week. In consequence of their schedules, some banquet waitresses work almost 40 hours a week, some of them work much less than 40 hours a week, and some of them do not work at all during some weeks. Before Stewart became banquet manager in August, the banquet waitresses had been scheduled by banquet waitress Kathleen Walker, who was personally acquainted with all the other waitresses and knew which ones were the steady ones and which ones would be available for work on particular days. At all material times before the October 18 discharges at issue here, the Respondent had seven banquet waitresses, the "steady" ones being Kathleen Walker, Hendriks, and Rees. When Brand introduced DeAngelo to Stewart, inferentially about September 14, she told them that for a sitdown dinner, she used 1 waitress for every 25 to 30 patrons, depending on the menu. Thereafter, DeAngelo told Stewart that he wanted 1 waitress for every 25 to 30 patrons. He also so advised the banquet waitresses informally on at least three occasions. None of the waitresses ever told him that, unless she scheduled her own time, she would quit or refuse to come in, nor is there any evidence that any of them otherwise raised any question with him about the ratio. About September 20, the Respondent put in a newspaper advertisement for banquet waitresses. By October 18, DeAngelo had interviewed about 30 applicants and found some to be satisfactory. However, he hired no new banquet waitresses until after the October 18 discharge of the old ones.

In late September, DeAngelo took over the task of scheduling the bartenders. About this same time, he told Stewart that he wanted her to make out the banquet waitresses' schedule and he wanted to approve it. However, there is no evidence that she ever submitted this schedule to him before posting it.

The Respondent's restaurant is ordinarily closed on Mondays. About mid-September, the Gloucester Board of Realtors advised the Respondent that it wanted to schedule a gathering on Monday, September 28, at which coffee and "Danish" would be served to about 60 people. Because the Gloucester Board was a good customer, Brand told Stewart to schedule this affair. Stewart testified without corroboration or direct contradiction that on undisclosed dates, she asked the banquet wait-

resses to volunteer for that affair, and none of them did. Brand testified without contradiction that about Friday, September 25, Stewart told him that she wanted to "fire the girls" because "she won't staff a banquet on Monday." An undated entry that the waitresses had "refused" to work at the September 28 affair appears in an unidentified hand on the typewritten banquet schedule. A few days before September 28, the Gloucester Board advised the Respondent that "maybe" 15 or 20 people would attend. About 11 people in fact attended. Stewart worked this affair by herself, without any problems.

On September 23, one banquet was scheduled for 6 p.m. and three more for 7 p.m. All were scheduled to be and were served by the same 7 waitresses, comprising all of the Respondent's banquet waitresses. The 6 p.m. affair was scheduled for 40 to 60 persons, and two of the 7 p.m. affairs were scheduled for 40 persons (the Gloucester Bankers Association) and 80 to 90 persons (the Colonial Conference), respectively. The remaining 7 p.m. affair, the "Dalton MS" banquet, was basically a buffet affair for 125 to 150 persons, but the head table and physically handicapped guests were served plated dinners. The Dalton guests who used the buffet service later complained that they had to wait too long for empty service platters to be replenished. Also, one of the Respondent's owners, Sori, complained that the Respondent was losing money because nobody was offering drinks to the patrons. In addition, a patron or patrons at the Colonial Conference banquet complained to the Respondent, inferentially, about slow service. DeAngelo told Brand, and testified at the 10(j) hearing, that the Respondent was understaffed.

On September 30, the New Jersey Education Association was scheduled to have a banquet at 6 p.m., and a 152-person group referred to in the record as the "Guisseppi Golfers Association" was scheduled to have a banquet an hour later, at 7 p.m. The same seven waitresses (comprising all of the Respondent's banquet waitresses) were scheduled to and did serve both banquets. Because the kitchen had difficulties in readying the food for service, the 109–112 Education Association members had to endure a 40-minute wait between their soup and their entree.[21] At the 10(j) hearing, DeAngelo testified that he believed the delay was due to the fact that contrary to the schedule, both groups started to eat at the same time. He further testified at that hearing that all of the waitresses scheduled to serve the two banquets reported to work, and he did not testify that they would have been insufficient in number to serve both banquets adequately if the original time schedule had been adhered to. Brand expressed the opinion that because banquets sometimes do not begin at the scheduled hour and the period between the scheduled hours for these banquets was rather short, 13 waitresses should have been assigned to banquet duty that evening. He went on to testify that Stewart should have supplemented the seven-waitress banquet staff by borrowing waiters or waitresses from the a la carte section.

Later that evening, DeAngelo, Brand, and Stewart met with the banquet waitresses to discuss their complaint about a gratuity they had received in connection with a golf outing on September 18. DeAngelo told those present that he wanted Tall Pines to be a profitable restaurant, and that this goal could be accomplished if everyone worked together. In addition, he said that he was unhappy with the waitresses' performance, that the banquets were not being staffed properly, that he wanted 1 waitress for every 25 to 30 patrons, that he wanted Stewart to schedule the waitresses, and that he did not want them to schedule themselves. None of the waitresses protested this proposed ratio. In addition, DeAngelo reproached them for having one waitress punch all the waitresses' timecards.

By October 4, DeAngelo had decided to replace Stewart as banquet manager because (he testified) he believed her to be incompetent. That day, October 4, Brand and DeAngelo offered DiPonziano, who then held a part-time job as banquet maitre d', a full-time job as banquet manager to replace Stewart. Brand and DeAngelo said that Stewart let "the girls schedule themselves,"[22] and that Brand and DeAngelo did not think that "the girls should be making out their own schedule." DeAngelo said that if DiPonziano accepted the banquet manager's job, he would be expected to have "complete, firm control of the girls." DeAngelo further said that he wanted a ratio of 1 waitress to 25 to 30 guests "on a cover." DiPonziano said that if he took the job, he would take the responsibilities that would go with banquet management, but asked for a few days to think the matter over. He eventually rejected the offer because it would have compelled him to resign his full-time teaching job and thereby to lose money.

On the evening of Saturday, October 17, after consulting with Kathleen Walker as usual, Banquet Manager Stewart decided which banquet personnel were to work on each banquet for the week ending Sunday, October 25. Then, Walker drew up this schedule in her own handwriting, and it was posted in the banquet kitchen without being shown to DeAngelo first. This schedule stated that five waitresses (Kathleen Walker, Hendriks, Rees, Tighe, and Komine) and busboy Greg Adair were to work at the Makos-Trionso wedding reception on October 25. The bride had sent out 250 invitations, and had advised the Respondent about October 3 that she expected 250 guests. However, thereafter she had given the Respondent a number of different estimates which varied between 150 and 250. When preparing the 5-waitresses/1-busboy schedule, Stewart had estimated that about 175 guests would attend the wedding reception. The bride was required to advise the Respondent, 48 hours before the reception, the number of guests for which payment would be guaranteed. Stewart had arranged with banquet waitress Kathleen Walker to tell banquet

[21] My finding as to the reason for the delay is based on the 10(j) testimony of Stewart, who was physically on the scene. DeAngelo's 10(j) testimony indicates that he had no personal knowledge of why the delay occurred.

[22] DiPonziano, who had worked for the Respondent since November 1980, testified that "That's always been the case since I've been there." However, he denied that this practice had ever caused an insufficient number of waitresses to work at a banquet.

waitress Agnes Walker, who was Kathleen's sister and lived with her, that Agnes' services might be required if the number of wedding reception guests turned out to be larger than expected. Also, when banquet waitress LaBounty dropped in on the evening of October 17 to find out her work schedule for the forthcoming week, Kathleen Walker told her, "There is a big wedding. You could be added to the list." The five waitresses listed on the schedule, together with Agnes Walker and LaBounty, comprised all of the Respondent's banquet waitresses. Brand testified that if all of them plus the busboy had been scheduled for the Makos wedding, it would have been sufficiently staffed assuming 230 to 250 guests had attended.

Stewart had advised DeAngelo about the wide fluctuation in the bride's estimates of the number of guests for the Makos wedding reception. However, DeAngelo testified that late Saturday night, October 17, he saw the posted schedule and "couldn't believe" that only 5 waitresses and 1 busboy had been scheduled for a banquet which "was supposed to be between 230 and 250." Brand and DeAngelo testified that about 11 p.m., DeAngelo brought the schedule to Brand and angrily said, "we've been trying to get those people to . . . put the right amount of people to work so we satisfy our customers, so we can give good service and . . . they've got six people, five waitresses and a busboy scheduled for the Makos wedding." Admittedly, neither he nor Brand made any effort to get in touch with Banquet Manager Stewart about the matter until after management had decided, on the following day, to discharge six of the seven banquet waitresses.

As previously noted, between 11 that evening and 9 a.m. the next day, Sunday, October 18, Brand telephoned Dr. Monaco and asked him to come to the Respondent's office. Brand testified that he requested Dr. Monaco's presence on October 18 because the decision to discharge so many of the banquet waitresses was a "pretty heavy" one. The directors/owners had conducted their usual weekly meeting on October 15 and were scheduled to conduct another weekly meeting on October 22. Brand testified that DeAngelo said the banquet waitresses were holding down the number assigned to each affair in order to increase each individual's share of the gratuity, Brand wanted to keep the existing crew of banquet waitresses and hire some more, DeAngelo then convinced Brand that DeAngelo could not work with the existing crew because they were not "cooperating" and were not going to cooperate, Brand expressed concern about obtaining replacement waitresses, and DeAngelo said that he could fill the jobs properly with applicants who had responded to the Respondent's help-wanted advertisement in late September.[23] Dr. Monaco testified that he was told that Stewart had been instructed to schedule enough waitresses for each banquet, that the banquet waitresses continued to schedule themselves, and that DeAngelo wanted to let them go. Dr. Monaco further testified that it was he (not Brand, as Brand testified) who asked DeAngelo about the availability of replacements. DeAngelo testified to the belief that the banquet waitresses had been agreeing among themselves, and in collusion with Stewart, on who was to work which banquet, and that, in consequence, the schedule had called for understaffing at the Makos wedding reception. He further testified that he had never been present during such a conference among the waitresses, had never been told that such conferences were being held, and had never asked any of the waitresses what role they had played in drawing up the schedule which was posted on October 17. He testified that his inference of collusion was based partly on the banquet waitresses' October 14 request (through Rees) for showup pay when the Cuccinotta dinner party failed to appear. There is no probative evidence that any banquet waitresses ever failed or refused to work at any affairs for which they had been scheduled. Brand admittedly never revised the scheduling procedure and thereafter told the waitresses to work the schedules so prepared; and DeAngelo testified that no waitresses ever told him or Brand that she objected to management's proposed waitress-patron ratio, or told DeAngelo that unless she scheduled her own time, she would quit or refuse to come in.

As previously noted, during the October 18 conference Brand, DeAngelo, and Dr. Monaco also decided on the immediate discharge of part-time bartenders Burrough, Gruber, and Rajczy. Brand testified that, at the October 15 board meeting, the Respondent decided to discontinue the use of part-time bartenders after a date between Thanksgiving and New Year's Day. Dr. Monaco testified that during the October 18 conference he proposed that the part-time bartenders be discharged at once, and that DeAngelo wanted to delay this action until the first of the following year. According to Dr. Monaco, he wanted a "fresh crew" and said, "Look, you bite the bullet now, start fresh." Brand testified that Dr. Monaco said, "Let's clean house, may as well do it now." Dr. Monaco testified that the use of only full-time bartenders had been recommended by Hospitality Enterprises Representative Whitehead (the food and beverage manager before DeAngelo assumed that post over a period between September 12 and October 4) and about April 1981 by Joey DeMore (a banquet manager at a nearby establishment whom the Respondent was interviewing on undisclosed dates to become its own banquet manager). Dr. Monaco further testified that the use of only full-time bartenders had been discussed at "various board meetings." The minutes of the six board meetings between September 3 and October 14 (the last-held meeting during this period was held on October 8) contain no reference to discontinuing the use of part-time bartenders. As previously noted, the minutes of the October 15 board meeting contain the entry, "Full time employees in banquet area John [Brand] or Tom [DeAngelo] to discuss. Banquet manager and bartenders in colusion [sic], bad situation, part-time." Brand testified that the part-time bartenders did their jobs well, and that customers had never complained about them. None of them had ever received any written warnings or other written dis-

[23] However, Brand testified from time to time that the original purpose of these advertisements had been to replace the old banquet waitresses. At other points, he corroborated DeAngelo's testimony that, as the old banquet waitresses had been advised on October 10, the advertisements were directed at enlarging the existing staff.

cipline, and there is no evidence that any of them had ever received any oral discipline. As of the April 1982 10(j) hearing, the Respondent had five part-time bartenders. The three part-time bartenders whose discharge was decided on during the October 18 meeting had worked for the Respondent for periods ranging from 1-1/2 years (Rajczy) to 11 years (Burrough).

On the morning of October 20, Stewart asked DeAngelo what had happened and why it had happened. He said that "here were changes," that he thought it was necessary to terminate all that he had terminated, and that he "didn't like the girls' attitudes." Stewart asked why, but received no response. She asked for specifics. She received no immediate response. However, a little later, he pulled out the work schedule which had been posted on October 17 for the week ending on October 25, and also a letter from the Gloucester County Education Association. The letter stated that the association was not going to use the Respondent's facility any more because, at the September 30 banquet, the association had not been given the banquet and meeting facilities it had been promised (a change decided on by General Manager Brand); the food (for whose preparation the banquet waitresses were not responsible) had been insufficient or inferior; and the patrons had had to wait for 40 minutes between their soup and their entree (because, as previously noted, the kitchen had been unable to get out the food). Stewart asked why she had not previously seen the letter, which was dated 13 days earlier. DeAngelo said "that was his policy."

That afternoon, while Stewart was performing her duties, Nancy DeAngelo (Thomas DeAngelo's wife) was present no matter where Stewart went. Without consulting Stewart, Nancy DeAngelo made changes in the table setups, on the ground that "I thought it would be nice . . . but I'm not here to take your job." As described supra, part II,F, that day (October 20, 1981) was in fact Stewart's last day on the job. Thereafter, Nancy DeAngelo became banquet manager, a post which she still held as of the April 1982 10(j) hearing.

Seven newly hired waitresses plus one busboy worked at the Makos wedding reception, which was attended by 230 people and was the largest banquet scheduled by the Respondent between September 14 and October 27. These waitresses included Brand's wife and three daughters and (perhaps) the daughter of Nancy and Thomas DeAngelo.

N. *The Union's Alleged Majority Status*

For the reasons stated below, I find that as of October 19, 1981, when the Union asked the Respondent to recognize it, the appropriate bargaining unit consisted of 66 employees, of whom at least 43 had executed operative union cards.

1. Employees in the unit

a. *Employees stipulated to be in the unit; alleged discriminatees*

The parties stipulated to the appropriateness of a unit consisting of "all waiters, waitresses, bartenders, dishwashers, pantry employees, cooks, busboys, cashiers, stewards, and banquet employees including steady extras and hostesses employed by Respondent . . . but excluding guards and supervisors as defined in the Act." All parties further stipulated that on October 19, 1981, the Union orally demanded recognition from the Respondent as collective-bargaining representative of the employees in that unit plus the banquet maitre d' hotel. Further, all parties stipulated that, as of that date, the unit included the 55 employees listed infra, Appendix A.[24] All parties agree that the eight persons listed infra, Appendix B were in the unit if, but only if, I find their discharge to have been unlawful. In view of my finding that they were discharged for union activity (see infra, part II,o,2), they, too, will be included in the unit.

b. *Frances Ann Witt*

The Respondent would include Frances Ann Witt; the General Counsel would exclude her as a casual employee. She worked as a waitress in the Respondent's a la carte restaurant operation on October 16, 17, and 20, but did not return to work thereafter. The record fails to show whether the Respondent scheduled her to work after October 20. She has not been terminated in any way. As previously noted, the picketing began on October 27. Brand credibly testified that it is usual for Peacock Room waitresses to work 2 or 3 days a week. I conclude that she was a regular rather than a casual employee, and will include her in the unit.

c. *Milchanoski*

The General Counsel would include Milchanoski; the Respondent would exclude him. Milchanoski was a part-time bartender who started working for the Respondent in February 1980. He had the same supervisor and was paid in the same manner (hourly wage plus tips) as the other part-time bartenders, who were admittedly in the unit; and (like them) received no benefits. He worked 1 to 4 days a week every week except at times during the summer, which was the Respondent's slow season and during which he, like other employees, was not scheduled to work for 1 or 2 weeks.

At all relevant times, Milchanoski has also been employed as a physical education teacher in high school and as a lightweight football coach at the University of Pennsylvania. About the late summer of 1980, he advised part-time bartender Burrough, who at that time was doing the scheduling for the part-time bartenders,[25] that Milchanoski would not be available for work between about September 15 and October 31. He resumed part-time bartending for the Respondent in early November 1980. About September 6, 1981, Milchanoski advised Whitehead of Hospitality Enterprises, who at that time was the Respondent's food and beverage manager, that

[24] The General Counsel and the Union include LaBounty on the ground that she had been discriminatorily discharged. The Respondent includes LaBounty on the ground that she was never discharged and was on strike at all times after October 27. I have found supra, part II,D, that she was discharged. I find infra, part II,o,2, that her discharge was due to union activity.

[25] No contention is made that Burrough was a supervisor at any material time.

Milchanoski would not be able to work for 8 or 9 weeks beginning about September 15, and would be back at the beginning of November. Whitehead said that that would be no problem as long as Milchanoski had done it before and Burrough knew how the situation was going to be handled. Milchanoski did not actively work for the Respondent after the Labor Day weekend of 1981. By October 4, the Respondent had discontinued Hospitality Enterprises' services, DeAngelo had succeeded Whitehead as food and beverage manager, and DeAngelo had taken over the task of scheduling the bartenders. Milchanoski never met DeAngelo. By the time Milchanoski completed his coaching assignment at the end of October, the picket line had been set up at the Respondent's establishment. He picketed many times; but did not ask any representative of the Respondent to be put back to work, even after the picket line was removed, because he assumed that he had been discharged (see supra, part II,j; infra, part II,o,2).

I agree with the General Counsel that as of October 19, 1981, Milchanoski was a regular part-time employee on leave of absence and, therefore, should be included in the unit. *Platt Electric Supply, Inc.*, 220 NLRB 143 (1975); *V.I.P. Movers*, 232 NLRB 14 (1977). The evidence shows that notwithstanding Whitehead's mid-September departure and Burrough's October 18 discharge, the Respondent's management as of October 19 was aware of and considered itself a party to the Milchanoski-Whitehead arrangements in early September. Thus, the Respondent stipulated during the 10(j) proceeding that "during the week of [Sunday], October 25, 1981, Respondent decided to terminate the employment of John Milchanoski," a decision the Respondent would hardly have made with respect to someone who it believed was by that week no longer in its employ. Furthermore, although General Manager Brand testified that Milchanoski had told him that "after Labor Day [Milchanoski] was going to be a coach, he wouldn't be working," Brand further testified that Milchanoski was a part-time bartender in September and October 1981 prior to October 19.[26] In any event, I regard as determinative Milchanoski's leave-of-absence arrangements with early September management, at least absent affirmative evidence that the Respondent's October 19 management was unaware of or had for lawful reasons decided to withdraw from the arrangement.

d. *DiPonziano*

The General Counsel would include DiPonziano; the Respondent would exclude him on the ground that he was a supervisor. The Respondent's day-to-day operations are headed by its general manager, Brand. Directly under him was DeAngelo, who was the head of the Respondent's entire food and beverage operation, and had the power to hire and fire. DeAngelo was also directly in charge of all the bartenders. Immediately under him were the chef (in charge of kitchen employees), Maitre D' Andre Catalano (in charge of a la carte restaurant employees), and Banquet Manager Stewart (in charge of the banquet personnel, other than the bartenders). Stewart supervised DiPonziano, the seven banquet waitresses, and (perhaps) any busboys assigned to the banquet operation. The power to hire and fire banquet department personnel resided in Stewart and DeAngelo. Stewart dealt with the public over the telephone, booked parties, and handled supplies and scheduling to enable functions to "go off." No contention is made that the banquet department included any supervisors other than the banquet manager and DiPonziano.

DiPonziano was a full-time school teacher who worked about 20 hours a week for the Respondent. Most, but not all, of the affairs handled by the banquet department were held outside school hours.[27] DiPonziano's job title was "banquet maitre d'." His duties included checking the floor plan of the banquet room, making sure that it was properly set up, ascertaining from the banquet patron in charge what he wanted DiPonziano to do as a banquet maitre d' for the particular type of affair, acting as "emcee" if requested, servicing the head table and family tables when necessary, walking around to the tables to make sure everyone was happy, and presenting the bill to the customers at the end of the evening. He never hired employees, and there is no evidence that he had authority to do so. He never fired or suspended employees, or wrote up an employee for disciplinary reasons, or had occasion to do so; the Respondent does not appear to contend that he had authority to do so. He did not schedule employees for work, and did not have authority to grant time off.

Brand testified at the 10(j) hearing that, while acting as maitre d', DiPonziano had authority to give a waitress permission to leave early. Brand did not testify that DiPonziano had ever been so advised. DiPonziano testified at that hearing that, when the new management took over, he was merely told to continue what he had been doing. He further testified that no employee had ever asked his permission to leave early, and that DiPonziano would have had to ask someone else before granting such permission. I conclude that he had no authority to give permission to leave early. *Tio Pepe, Inc.*, 237 NLRB 537 (1978).

DiPonziano was in charge of the banquet area when the banquet manager was not around. Stewart's predecessor as banquet manager had at least sometimes left early, but Stewart (banquet manager during the last 2 months of DiPonziano's employment) never had. Stewart received a weekly salary, plus one percent of the banquet food and beverage sales. DiPonziano was paid by the hour; assuming that Stewart worked 40 hours a week, she was paid about a third more than he in salary alone. DiPonziano's hourly pay was 87 percent higher

[26] When asked the identity of the bartenders in the banquet department in September and prior to October 19, Brand testified, "The head bartenders would have been . . . Burrough, next would be either Tom Gruber or John Rajczy, and after that would be John Milchanoski and after that Bob Troxell." The Respondent stipulated that Troxell was in the unit as of October 19, and that Burrough, Gruber, and Rajczy were then in the unit if their October 18 discharge was unlawful.

[27] About one-fifth of the affairs conducted by the banquet department between September 8 and October 20, inclusive, were conducted before 3 p.m. on Monday through Friday. However, the evening and weekend affairs tended to serve many more patrons and to have more elaborate menus.

than that of most of the banquet waitresses, and 140 percent higher than that of one of them, but they received tips and there is no evidence that he did. On occasion, DiPonziano made changes in the times which had been recorded by the timeclock on employees' timecards. The changes so made included (and, perhaps, consisted of) writing in the quitting time of employees who did not clock out, and entering an employee's actual quitting time as an hour and a half after her clock out time.[28] Making such entries was within the authority of DiPonziano and admitted management personnel, and the employees were paid on the basis of the cards as so changed. DiPonziano had keys to the interior rooms, and stated in his prehearing affidavit that only members of management and supervisory personnel had keys. After 10 months of employment as the banquet maitre d', he was given keys to the banquet office, which was used by both him and admitted Supervisor Stewart. When asked on direct examination during the 10(j) hearing who was present "for management" during the October 10, 1981, meeting when the waitresses were advised that the Respondent was going to keep part of the "gratuity," employee Rees, a banquet waitress since 1976 and until 2 days before DiPonziano's last day of work, replied, "Mr. DeAngelo, Mr. Brand, Paul DiPonziano. I was."

There is no contention or evidence that DiPonziano had the authority, in the Respondent's interest and in the exercise of independent judgment, to hire, transfer, suspend, lay off, recall, promote, discharge, or reward employees, or to adjust their grievances, or effectively to recommend such action. Laying to one side any authority which DiPonziano may have had during banquets in the banquet manager's absence, there is no evidence that he had the authority, in the Respondent's interest and in the exercise of independent judgment to assign or discipline other employees, or effectively to recommend such action.

The Respondent contends, in effect, that in the exercise of independent judgment, he responsibly directed employees in the banquet manager's absence, when he was in charge of the banquet area. I conclude that such direction did not involve the use of independent judgment because, although DiPonziano was employed on a part-time basis and was unavailable during school hours, there is no evidence that the Respondent ever made any actual or provisional arrangements to put a supervisor in charge of the banquet area when neither the banquet manager nor DiPonziano was on duty. In any event, the periods during which he was in charge of the banquet area were too sporadic and irregular to render him a supervisor. *Canonsburg General Hospital Assn.*, 244 NLRB 899 (1979); *Airkaman, Inc.*, 230 NLRB 924, 926 (1977). Nor is supervisory status shown by his activity in connection with timecards and employee Rees' opinion that he was part of management. *Airkaman*, supra; *Piccadilly Cafeterias*, 231 NLRB 1302, 1320 (1977). I agree with the General Counsel that DiPonziano was an employee rather than a supervisor, and will include him in the unit.

[28] The record suggests that this latter entry may have been made because the timeclock was not working right.

2. The number of operative cards

a. *The wording of the cards, the authenticity of the signatures, and the dates of execution*

As previously found, as of October 19 the bargaining unit consisted of 66 employees. The General Counsel offered into evidence authorization cards bearing the purported signatures of 44 of such unit employees (see infra, Appendixes A,B, and C). The cards are headed, in bold face type, "Authorization/Hotel and Restaurant Employees & Bartenders International Union Local AFL-CIO 54," followed by the Union's address and telephone number. The cards go on to state, in part: "I, [blanks calling for the employee's printed name, address, employer, social security number, and job classification] hereby authorize Local 54 to act as my bargaining representative . . . ." The printed material after the word "representative" constitutes a checkoff authorization. The last line of the cards calls for the employee's signature and the date. The Respondent does not appear to question, and I find, that such cards on their face unambiguously authorize the Union to act as the signatory employee's bargaining representative.

Further, the Respondent does not appear to question the authenticity of any of the signatures, except for the card bearing the purported signature of John A. Sergeiko.[29] This card was received by union business representative Bocchicchio during or immediately after the October 12 union meeting, and was one of those which union attorney Warren Borish gave to the Board's Regional Office when he filed the Union's representation petition on October 19. Sergeiko's employment application and W-4 form were received without objection as General Counsel's Exhibit 35 A. The signatures on all three documents appear to have been written by the same person. Moreover, the hand-printed matter on all three documents appears to have been printed by the same person; and the address, telephone number, and social security number on the union card are the same as those set forth on the application and/or the W-2 form. Sergeiko did not respond to a subpoena issued at the General Counsel's instance; and the General Counsel stated on the record that when he called the telephone number which he had for Sergeiko, the General Counsel was informed that Sergeiko was in Virginia and would not be present at the unfair labor practice hearing in Philadelphia, Pennsylvania. I find that Sergeiko's purported signature on the card was in fact written by him on or before October 12.[30] *Justak Bros. & Co.*, 253 NLRB 1054, 1079-80 (1981), enfd. 664 F.2d 1074 (7th 1981). The unit employees whose union cards were sufficiently authenticated are indicated infra, Appendixes A, B, and C.

A number of the employees failed to date their cards. As to some cards, the date of signature is established by credible testimony of the signer or the person who solic-

[29] As described infra, Milchanoski and Gruber authorized Rajczy to sign cards on their behalf, and Rajczy did so.

[30] The card is dated October 10. The date appears to be written with the same pen and in the same handwriting as the other entries on the card. See *Cato Show Printing Co.*, 219 NLRB 739, 756 (Cory) (1975).

ited the card. The credible testimony further shows that 39 of the cards received in evidence[31] were received by union representative Bocchicchio during or at the close of the union meeting on October 12, and were filed with the Board on October 19 when the Union filed its representation petition.[32] I find at this point that all 39 of these cards were signed between October 9 (the date when Hendriks obtained union cards from Abruzzo) and October 19 (the date when the Regional Office received them). Where at least arguably material to other issues, conflicting evidence as to the exact date on which they were signed is discussed below.

As to the cards not submitted to the Board with the October 19 petition, I find as follows:

1. Employee DiCintio credibly testified that employee *William Patton* signed his card in DiCintio's presence on a date between October 11 and 16.

2. Abruzzo credibly testified that he saw *Matthew Simone* sign his card on October 15 or 16.

3. Employee Rees testified before me without direct contradiction that on October 11 she gave a blank card to *Matt Hayden* in the hallway connecting the dining room to the kitchen, and that he read it, signed it, and returned it to her. Hayden did not testify. Rees further testified before me that on the same date and in the same area as she allegedly procured Hayden's signature (and also the signature of Francis Turton and James Cargill Jr.), she also procured the signature of Joseph McClintock, and that she took all four cards with her when she left the facility that day.[33] Employee Gregory Adair testified for the Respondent that McClintock obtained his card from Adair, and signed it in the hall in his presence and "I am pretty sure," at the same time Adair did. Adair further testified that both he and McClintock turned in their cards at the October 12 union meeting. Adair testified that he received his card between the two bars from an unidentified waitress and signed it a little later. On direct examination, he testified that he received and executed his card on a Sunday, but his card is dated October 10, a Saturday, in his own handwriting, and he testified that if he put that date down, "It must have been the day." As to Adair's card, employee Tighe testified that she gave it to him at the waitress' station right outside the main kitchen on Sunday, October 11, and that he signed it and gave it right back to her.

Neither Rees nor Adair nor Tighe gave any positive testimony which would establish that any card was signed after October 19. The Respondent seems to contend that Adair's testimony regarding his own and McClintock's card impeaches Rees' testimony, which is not directly contradicted, regarding when Hayden signed his card. For demeanor reasons, I am inclined to credit Rees and Tighe over Adair. However, even if I believed Adair, I would find that all the cards discussed in this paragraph were signed by October 19. In this connection, I note that Bocchicchio put an October 17 date on Hayden's card, and credibly testified that after October 12, as to undated cards he inserted either the date he received them or the date when Abruzzo said he received them.

4. *Mario Pavone*, who appeared to be in his early 60's and at the time of the hearing was actively working for the Respondent as a dishwasher, testified on direct examination that he signed his card after the picket line had been set up (that is, on or after October 27) at the behest of Head Chef Leon Boyte, who was admittedly his supervisor. Employee Gary Grossman testified that Pavone signed his card on October 10 at Grossman's behest, and then returned it to Grossman. The Respondent contends that Grossman's credibility is impeached by his allegedly improbable testimony (neither corroborated nor contradicted) that when he gave employee *James Jones* a card on October 9, Jones signed immediately but did not return it until several days later. However, such conduct by Jones is perfectly consistent with a desire to take a second look at the matter before opting for union representation.[34] The only peculiarity in connection with Grossman's testimony is the fact that although he testified that he gave the cards signed by Don Bonney and Pavone to Kathleen Walker at the October 12 union meeting, Bocchicchio inserted an October 11 date on Bonney's card and an October 17 date on Pavone's card. On the other hand, Pavone's testimony shows on its face that he was forgetful, confused, and evasive. Thus, when shown his card, which Bocchicchio dated "10/17/81," Pavone testified that he signed it "the 10th or 17th." By way of explanation, he later testified that he had read the date on the card, and "I took for granted that was the date" he signed it. He initially denied reading the card; then, he denied writing his social security number and job classification on the card (although they are in handprinting which is strikingly similar to the printing in which she admittedly entered his name and address); and then, when this resemblance was pointed out to him, testified, "I don't know. I may have. I don't know. See I forget easy." Further, he initially testified that he had worked for the Respondent for a "couple of weeks in September" and not thereafter until the end of 1981, then testified that his first tour of duty "could have been October," and admitted that he has a poor memory for dates. Moreover, when asked on cross-examination whether it was possible that he received his card from Grossman rather than Boyte, Pavone replied, "That I don't know. See, I didn't know much about these people because I only been there two weeks." After considering the foregoing and the witnesses' demeanor, I credit Grossman's testimony regarding Pavone's and Jones' cards, including Grossman's testimony that he told Pavone "if he wanted an opportunity to be represented by the Union, he should read the card and sign it,"

[31] The exceptions were the cards signed by Matt Hayden, James Jones, William Patton, Mario Pavone, and Matthew Simone.

[32] At that meeting, Bocchicchio inserted on the undated cards the dates which Abruzzo gave him as the signature dates. Where Abruzzo did not know or could not recall the signature dates, Bocchicchio inserted the meeting date, October 12.

[33] Rees testified at the 10(j) proceeding that on October 11, she obtained cards from five other employees whose names she was not asked to give. The briefs do not discuss this matter. About eight cards filed with the Regional Office on October 19 were not offered into evidence.

[34] Jones gave 2 weeks' notice about October 9, and his last day of work was October 23. I regard this as immaterial to the operative effect of his card as of October 19. *Radio Free Europe*, 262 NLRB 549 (1982); *Personal Products Corp.*, 114 NLRB 959, 961 (1955).

whereupon Pavone read the card, signed it, and returned it to Grossman.

In short, I find that all 44 cards received in evidence were signed between October 9 and 10.

b. *The operative effect of the cards*

(1) Supervisory participation in the union drive

The Respondent contends that the cards were rendered inoperative by supervisory participation in the union campaign. Line Supervisor Stewart, the banquet manager, signed a card on October 10 and attended the October 12 meeting. At least 35 cards were signed before that meeting. Cards were signed at that meeting by Komine (who had received her card from and been solicited by Kathleen Walker) and by other, unidentified employees. There is no evidence that Stewart solicited employees to sign cards at that meeting or on any other occasion while still in the Respondent's employ. Further, there is no evidence that she told any employee that the Respondent favored the Union, nor is there evidence that the employees had any other basis for so believing. Stewart held a union meeting at her home on October 26, by which date all the cards had been signed and she no longer worked for the Respondent. I conclude that Stewart's prounion activity did not render inoperative any of the authorization cards signed by employees. *Medical Investors Assn.*, 260 NLRB 941 (1982); *La Mousse, Inc.*, 259 NLRB 37 (1981); *Kut Rate Kid*, 246 NLRB 106 (1979).

I find no merit in the Respondent's further suggestion that the cards solicited by Kathleen Walker were tainted because of her assistance to Supervisor Stewart in preparing the banquet waitresses' work schedule. Kathleen Walker was admittedly a nonsupervisory employee. Moreover, there is no evidence that the banquet waitresses signed authorization cards because of any fear that she would give them poor work schedules if they did not sign. Indeed, Kathleen Walker solicited only two of the banquet waitresses to sign cards—her sister Agnes, who lived with her, and Komine. Kathleen told both of them to sign if they wanted union representation. Cf. *Kut Rate Kid*, supra, 246 NLRB at 107, holding that even cards solicited by a supervisor would be valid absent evidence to establish that he coercively induced the employees to sign because they feared supervisory retaliation by him. Accord: *Industry Products Co.*, 251 NLRB 1380 fn. 2 (1980), enfd. 673 F.2d 164 (6th Cir. 1982).

The Respondent also points to the union activity of DiPonziano (supra, part II,B), to Chef Boyte's alleged October 27 solicitation of employee Pavone's card (supra part II,N,2,a), and to employee Grossman's testimony that "eventually I think [Boyte] might probably—might have been" in favor of the Union (although he was initially "not too sure" about the Union, and made no statements about it during the early stage because, in order not to "jeopardize" him if he was part of management, the employees did not let him know what was going on). If I have erred in finding DiPonziano not to be a supervisor, he would (of course) be excluded from the unit and his card would not be counted. Also, Pavone's card would not be counted if it was executed about October 27 (and after the October 19 critical date) instead (as I have found) of being obtained by employee Grossman on October 10. However, even assuming that DiPonziano was a supervisor and that Supervisor Boyte procured Pavone's card, the precedents cited in the two foregoing paragraphs call for rejection of the contention that the remaining 42 authorization cards are tainted. Thus, all the other cards received into evidence were executed before Boyte allegedly asked Pavone to sign a card. Moreover, although Pavone testified that he "more or less" thought Boyte was compelling him to sign a card ("He thought that I should sign the card . . . he was the boss at the time, and I figured he knew what he was talking about"), Pavone could not recall on cross-examination what Boyte said, and on direct examination, Pavone testified that Boyte said, "Would you like to sign a card to get a union into the place?"

(2) The contention that certain cards were inoperative because of allegedly misleading representations regarding their purpose

The Respondent contends that certain cards were rendered inoperative by allegedly misleading representations regarding their purpose.

1. The Respondent contends that an unspecified number of cards were rendered inoperative by Bocchicchio's remarks at the October 12 union meeting. As previously noted, at least 35 cards (including DiPonziano's card) were signed before that union meeting. Moreover, as discussed infra, the record establishes that Milchanoski and Gruber, who authorized employee Rajczy to execute cards on their behalf, did not attend that meeting. Komine signed a card at that meeting. Bocchicchio testified that he saw four or five employees sign cards at that meeting; but Komine aside, the record fails to show who they were.

As to what was said at that meeting, Bocchicchio testified without contradiction that the union representatives "more or less gave [the employees] the guidelines of the procedures of getting an election and so forth, and [the employees] were inquiring about benefits and so forth, which we instructed them we couldn't promise them those things, that mainly we could give them job representation and job classification and things of that nature." Kathleen Walker testified without contradiction that Bocchicchio said that "we needed a majority of the people to sign the cards to get union representation"; and her prehearing affidavit, which stated the truth to the best of her memory at that time, states that someone asked what would happen if the Respondent fired everyone or got new people to vote against the Union. I perceive nothing in these statements which would render inoperative any cards signed in reliance thereon.

2. Employee Rajczy attended the October 12 union meeting, but *Milchanoski* and *Gruber* did not. Gruber knew that during this meeting union representatives would explain union benefits such as job security and answer questions concerning union activity, and that there would be cards there to sign by people who would be interested in having the Union come in. Before the meeting, Gruber told Rajczy that Gruber would go

along with whatever they decided to do. While the meeting was still in progress, Rajczy telephoned Gruber and told him that coming to the meeting was very important. Gruber said that he could not come. Rajczy said that the majority of the people had decided to go with the Union. Gruber said that if they were satisfied with the information that they received, he would go along with any decision that they made concerning joining the Union. Rajczy said that signing the card represented an interest in the Union, an intent to join it, job security, and that the Union would be the employees' bargaining agent. Rajczy further said that there would have to be a vote taken eventually and, if a majority of the people voted for the Union, the Union would be in at Tall Pines and the employees would then have job security. Rajczy read Gruber the card word for word, and said that it had to be signed. Gruber said, "Fine, sounds like a good idea. Sign the card for me." Rajczy asked Gruber for his address; put Gruber's name, address, telephone number, and job classification on the card; and wrote Gruber's name in the space calling for the employee's signature. That same evening, Rajczy gave the card to Bocchicchio. Gruber, who had a full-time job as a high school biology teacher, was a member of the union at that school.

That same meeting, Rajczy telephoned Milchanoski and told him that it was very important to attend the meeting. Milchanoski said that he had not yet had his dinner, and did not feel like coming out. Rajczy said that a majority of the employees had signed union cards, and that the employees had to sign in order to be represented by the Union and to tell the Respondent that the employees wanted to unionize. Rajczy said that there would be a vote on the Union at a later date, but that the "main point" was to obtain job security. Rajczy read the card to Milchanoski word for word. Milchanoski told him to fill out and sign a card for Milchanoski. Rajczy asked Milchanoski for his address, inserted his address and telephone number on the card, and wrote Milchanoski's name in the space calling for the employee's signature. That same evening, Rajczy gave the card to Bocchicchio.

My findings as to what was said during these telephone conversations are based on a composite of the testimony of Rajczy, Gruber, and Milchanoski. For demeanor reasons, I do not accept the Respondent's contention that the entire conversations were set forth in Gruber's and Milchanoski's prehearing affidavits. In any event, it is undisputed that the cards were read by Rajczy to Gruber and Milchanoski, all three of whom were high school teachers, and that Gruber and Milchanoski authorized Rajczy to sign cards on their behalf. Signatures so authorized are as effective as signatures in the employee's own handwriting. *Justak*, supra, 253 NLRB at 1080–81. Even assuming that Rajczy said only what was attributed to him in the other employees' prehearing affidavits, I see nothing in such remarks which "deliberately and clearly canceled" the clear language of the cards "with words calculated to direct the signer to disregard and forget the language above his signature" (*NLRB v. Gissel Packing Co.*, 395 U.S. 575, 607 (1969)).[35]

3. On October 10, *DiPonziano* (who is a schoolteacher) and Abruzzo engaged in a conversation about whether signing a union authorization card meant that the Union would be coming in or whether signing the card would merely give the Union the right to come in and talk to the employees and present its position. DiPonziano testified that he was "a little unsure." Abruzzo told him that the card did not necessarily mean that he had to go union when the vote came up, but just allowed the Union to come in and talk with the employees. Later that day, Kathleen Walker gave DiPonziano a card, and told him that it was "the authorization for the Union to represent us." He signed the card and gave it back to her. She said nothing about an election, and he did not tell her what he thought the card meant. Later that same day, DiPonziano engaged in still another conversation with Abruzzo during which DiPonziano was "still trying to get clarification exactly what it meant by signing an authorization card for the Union." Abruzzo again said that the card did not necessarily mean that he had to go union, but just allowed the Union to come in to talk with the employees. So far as the record shows, DiPonziano never tried to retrieve his card. He attended the October 12 union meeting and thereafter discussed the Union with other employees. Because DiPonziano's card is not determinative, I need not and do not rule on its operative effect.

O. *Analysis and conclusions*

1. The alleged independent violation of Section 8(a)(1)

I agree with the General Counsel that the Respondent violated Section 8(a)(1) by soliciting its employees' complaints and grievances and promising improved working conditions in order to discourage the employees' support of the Union. As previously found, waiter DiCintio advised Dr. Monaco that the recent discharges had caused the waiters to fear that they too would be discharged. After attempting to alleviate these fears, based on discharges most of which were due to union activity, Dr. Monaco asked whether there were any other problems. When DiCintio stated that DeAngelo was being unreasonably strict and was imposing unreasonable rules, and that the waiters (much of whose income depended on tips) needed more cooking pans to please patrons through tableside cooking operations, Dr. Monaco promised to remedy all these problems, and then went on to ask DiCintio, who had signed a union card a few days earlier, to attempt to induce his fellow waiters to abandon the Union.

[35] Gruber's prehearing affidavit stated that Rajczy told him that a majority of the employees signed cards, the card represented an intent to join the Union, a vote would have to be taken eventually and, if a majority voted for the Union, it would be in at Tall Pines and then the employees would have job security. Milchanoski's prehearing affidavit stated that Rajczy said that a majority of the employees had signed cards, that the employees had to sign cards in order to be represented by the Union and to tell the Respondent that the employees wanted to unionize, and that there would be a vote at a later date.

I conclude that the Respondent was thus impliedly promising such benefits on condition that DiCintio abandon his Section 7 right to remain neutral in the union campaign or to campaign in the Union's favor, and, instead, campaign against the Union. Such employer conduct violates Section 8(a)(1). *NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160, 164 (3d Cir. 1977); *NLRB v. K & K Gourmet Meats*, 640 F.2d 460, 465–466 (3d Cir. 1981); *Litton Industries v. NLRB*, 460 F.2d 23, 24–25 (3d Cir. 1972), cert. denied 409 U.S. 915 (1972).

2. The alleged discriminatory discharges

Moreover, I agree with the General Counsel that the Respondent decided to terminate six banquet waitresses, four part-time bartenders, and DiPonziano because of their union activity. Thus, the Respondent clearly did not want its employees to be represented by the Union. Owner/director/president Dr. Monaco admittedly did not want the employees to be represented by any labor organization, particularly the Union here. When examining the photocopied union cards submitted by the Union in support of its October 19 bargaining demand, Dr. Monaco described a card-signer in scatological language, stated that the Respondent could not have a union, and asked the Union to "go away for a year or two." On the following day, Dr. Monaco stated that the Union could "kill" the Respondent by discouraging prospective investors who intended to build condominiums on the Respondent's property, and promised benefits to the waiters to keep the Union out. Owner/director/general manager Brand was likewise "dead set against unions." Owner/director Sori, too, was upset by the Union's bargaining demand. Moreover, the day after that demand, Supervisor Andre Catalano said that the Union was no good, that a union of which Catalano had once been a shop steward was "a bunch of cutthroats," and that the Union would not help out the employees. Further, as originally drafted, the minutes of the October 22 meeting of the board of directors stated, "We will fight the Union."

Furthermore, the uncontradicted evidence establishes that all 11 of the employees named in the complaint had signed union cards. Such employees included all but one of the banquet waitresses (among whom the union movement had begun), the 2 banquet waitresses (Hendriks and Kathleen Walker) who had begun the union solicitation activity, and employees who had also obtained signed union cards from others (Rees, Burrough, LaBounty, and Rajczy). Further, the evidence leads me to conclude that when deciding to discharge these employees, the Respondent knew that they were union adherents. Such knowledge is indisputable as to DiPonziano and Milchanoski. The Respondent inspected photocopies of their union cards on October 19; advised DiPonziano on Tuesday, October 20, that the forthcoming Saturday would be his last day of work; and decided during the week of Sunday, October 25, to discharge Milchanoski. Moreover, I do not accept the testimony of Brand, DeAngelo, and Dr. Monaco at the 10(j) proceeding that, at the time of the October 18 discharges, they were unaware of the union movement. Thus, when union business agent Bocchicchio remarked to owner/directors Dr. Monaco and Sori on October 19, "Who in their right mind knowing that they had signed union cards would dismiss these people," Dr. Monaco replied, "the management did," and stated that he himself was the management. In addition, the minutes of the October 15 meeting of the Respondent's board of directors, which meeting was held after union cards had been signed by Banquet Manager Stewart and the four part-time bartenders named in the complaint, recite, "Full time employees in banquet area John or Tom to discuss. Banquet manager and bartenders in [collusion], bad situation, part-time." I read this entry to mean that the board of directors believed Stewart and the part-time bartenders to be colluding in efforts to bring the Union into the operation, and that the board regarded this a bad situation.[36] Moreover, although the employees did try to conceal from the Respondent the union activity on its premises, much (if indeed not most) of the union discussion, card solicitation, and card signing occurred on company premises during a week when DeAngelo worked for about 70 hours, moved around the entire banquet restaurant/bar operation, and was "on top of things." Also, on the very day that Abruzzo obtained the first blank union cards and gave them to banquet waitress Hendriks, his girl friend, he asked owner/director/general manager Brand what he was going to do if the "girls" went to a union.[37]

That the discharge decision was motivated by the employees' union activity is further indicated by Food and Beverage Manager DeAngelo's remark to Burrough, while he was cleaning out his locker, "How come you signed a card? How come you didn't come to me first?"

Moreover, the Respondent has never given any reason for its admitted desire to get rid of DiPonziano, whom it had offered a supervisory job about 2 weeks earlier and with whose work it admittedly had no problems. In addition, as to the Respondent's decision to terminate the banquet waitresses and the part-time bartenders, the Respondent gave reasons which it has abandoned and as to which there is no probative evidence. More specifically,

[36] The Respondent's brief asserts it to be more likely that "the taker of these notes confused the bartenders with the waitresses, whom Tall Pines management did indeed believe to be in collusion with Stewart, the Banquet Manager." However, these notes were taken by the board of directors' secretary. Any adverse inference from that person's failure to testify should be drawn against the Respondent. See *NLRB v. Wallick*, 198 F.2d 477, 483 (3d Cir.1952); *Zapex Corp.*, 235 NLRB 1237, 1239 (1978), enfd. 621 F.2d 328 (9th Cir. 1980).

[37] However, in finding such knowledge by members of management who participated in the discharge decision, I do not rely on any knowledge by maitre d' Catalano, who did not so participate. The testimony regarding his conduct and remarks during the October 15 union discussion between Rees, DiPonziano, and LaBounty does lead me to infer that Catalano knew they were discussing the Union, an inference supported by the fact that a card had by that time been signed by his son, who resided and drove home from work with him. Also, maitre d' Catalano's 10(j) testimony that before October 20 he did not discuss the Union with the owners or DeAngelo is somewhat inconsistent with his further testimony that he regarded himself as part of management, and with the undisputed testimony regarding his antiunion remarks to DiCintio on October 20. However, Catalano's October 15 remarks and conduct suggest that as of that date he had friendly feelings toward the Union, at one tine he had been a union member and steward, and he may have desired to protect his son from reprisals for union activity. Under all the circumstances, I accept his denial of pre-October 20 reports to his superiors regarding the union movement.

the Respondent does not now rely at all on the assertion to DiPonziano that the waitresses had been let go for sitting down in the dining room, cooking their own breakfast in the kitchen, leaving dirty tray racks in the dining room, and failing to take the initiative in saying hello to DeAngelo. Nor does the Respondent now rely at all on DeAngelo's statement to Hendriks that she was being discharged because the Respondent was not happy with the quality of her work. Nor does the Respondent now rely at all on DeAngelo's assertion to DiPonziano and Dr. Monaco's assertion to DiCintio that the part-time bartenders (all of them public high school teachers) had been discharged for stealing. Finally, the record shows that the reasons on which the Respondent does rely for its decision to terminate the banquet waitresses and the part-time bartenders were not the real reasons.

Just 8 days before the banquet waitresses' discharge, DeAngelo reiterated his statement to Burrough 2 days earlier that their jobs were secure. Brand admitted that the terminated banquet waitresses worked very hard and were the best crew that he or the Respondent had ever had. He further testified that he would have liked to keep them, add more waitresses, and get a strong banquet manager to control them. Brand went on to testify that the Respondent had not done this, but instead had discharged the waitresses, because the schedule posted on October 17 showed that too few waitresses had been scheduled for the October 25 Makos wedding reception, and that this underscheduling convinced him and DeAngelo that, in order to maximize each waitress' share of the "gratuity," the waitresses were agreeing among themselves to disregard the Respondent's instructions regarding the ratio of waitresses to banquet patrons. However, DeAngelo's testimony shows that he had no colorable basis for any belief in such collusion (see supra, part II,M). Moreover, the action taken by the Respondent was not the action which an employer would be likely to take if he really believed that such a problem existed. Although DeAngelo had taken over the task of scheduling the bartenders, he never took over the task of scheduling the banquet waitresses, nor is there any evidence that he berated Stewart for failing to schedule enough waitresses or to comply with his instructions to show him the schedule before posting it. Before the discharges, DeAngelo and Brand never added to the posted banquet schedules the names of any of the banquet waitresses already in the Respondent's employ, or hired more banquet waitresses. Nor did the Respondent use before the discharges the technique of assigning to banquet work the a la carte waitresses who were not already scheduled to work in the a la carte restaurant, although the Respondent began to engage in this practice after the discharges and conceded that it was available before the discharges as well. Furthermore, when DeAngelo allegedly concluded after reading the posted schedule about 11 p.m. on Saturday, October 17, that the five banquet waitresses scheduled for the October 25 Makos wedding reception were too few in number, neither he nor Brand took the natural steps directing an inquiry to Banquet Manager Stewart or the two unscheduled banquet waitresses, any of whom could have told him that Stewart had arranged to call the unscheduled waitresses if the Makos wedding turned out to have more guests than Stewart had anticipated. Instead, Brand arranged for a morning meeting on Sunday, October 18, at which five of the six-member board of directors, whose next scheduled meeting was the following Thursday, decided to discharge both the five waitresses whose names appeared on the written schedule for the Makos wedding reception and one of the two waitresses whose names were not on that schedule. In consequence, that large affair was handled by seven waitresses (a majority of whom were Brand's wife and daughters) who were hired after the discharges and had never worked for the Respondent before.

Unlike the General Counsel, I attach little weight to the Respondent's failure to discharge Stewart, who was charged with the responsibility of scheduling the banquet waitresses, at the same time that the Respondent discharged the waitresses; the evidence shows that at least by October 4, the Respondent was attempting to replace Stewart. However, I note that DeAngelo admittedly never saw the waitresses making arrangements with Stewart to limit the number of waitresses to be scheduled at each banquet, or received any reports that this had occurred. Further, DeAngelo testified that a partial basis for his alleged belief that the banquet waitresses had engaged in "collusion" as to alleged understaffing was the Section 7 protected activity by banquet waitresses Rees, Hendriks, and Kathleen Walker on October 14 in requesting showup pay. Cf. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964); *NLRB v. Kennametal, Inc.*, 182 F.2d 817 (3d Cir. 1950); *Cusano v. NLRB*, 190 F.2d 898, 902–903 (3d Cir. 1951).

Likewise pretextuous is the Respondent's explanation for its decision to terminate the part-time bartenders, all of them admittedly good employees. Just 10 days before the October 18 termination of Burrough, Rajczy, and Gruber, DeAngelo had told Burrough that their jobs were secure. The discontinuance of the use of part-time bartenders was not mentioned in the minutes of the board of directors for at least the 6 weeks before October 15, and on that date the minutes refer to such action in connection with alleged collusion between the banquet manager and the four part-time bartenders, all five of whom had by that time signed union cards. Further, Brand testified that even at that meeting, the board decided not to discontinue the use of part-time bartenders until some time between Thanksgiving and New Year's Day; and Dr. Monaco testified that during the October 18 conference, DeAngelo wanted to delay such action until the beginning of the following year. The only record explanation for the board's October 18, 1981, decision to take such action immediately is the statement from Dr. Monaco, who feared that the Union could "kill" the Respondent, that the Respondent needed a "fresh crew" and should "bite the bullet now, start fresh . . . let's clean house, may as well do it now." Moreover, at least by April 1982, the Respondent had more part-time bartenders than it decided to discharge in October 1981.

For the foregoing reasons, I find at this point that the Respondent's discharge of employees Ingrid Hendriks, Mona Komine, Susan LaBounty, Cindee Rees, Caryll Tighe, Kathleen Walker, Robert Burrough, Thomas Gruber, John Rajczy, and Paul DiPonziano was motivated by a desire to discourage union activity and, therefore, violated Section 8(a)(3) and (1) of the Act. Further, I find that the Respondent's admitted decision during the week of October 25 to discharge employee Milchanoski was similarly motivated. Remaining for consideration is the Respondent's contention that Milchanoski was not discharged, but instead voluntarily quit.

I agree with the General Counsel that Milchanoski was in fact discharged. As found supra, part II,N,1,c, he was on leave of absence when the union drive began in the second week of September 1981, but was in the Respondent's employ until at least the week of Sunday, October 25, 1981. At the May 1982 hearing, although agreeing with the General Counsel that Milchanoski's employment had been terminated, the Respondent took the position that such termination was voluntary (see Jt. Exh. 2, par. 3(c)). I perceive no factual basis for any contention that Milchanoski voluntarily terminated his employment at any time between October 1981 and the April 1982 hearing. His decision to honor and participate in the picket line which was set up during his leave of absence does not warrant any inference that he resigned. *Bartlett-Collins Co.*, 230 NLRB 144, 145, 169–170 (1977). Furthermore, the Respondent's witnesses testified that the Respondent decided on October 18 to immediately abandon the use of part-time bartenders like Milchanoski. I conclude that Milchanoski was discharged, and that his discharge was unlawful because motivated by his union activity. The remedy as to him is the same whether he was discharged before or after his early November decision to join the strike and the picketing. *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979), enf. denied 612 F.2d 6 (1st Cir. 1979). In any event, the discharge decision was admittedly made no later than November 1, 1981, and I infer that the actual discharge occurred very shortly after the decision was made.

3. The nature of the strike

The undisputed evidence establishes that the strike which began on October 27, 1981, was motivated partly by discharges herein found unlawful. Accordingly, the strike was an unfair labor practice strike from its inception. *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir. 1972), cert. denied 409 U.S. 850 (1972); *Pace Oldsmobile*, 256 NLRB 1001, 1010 (1981).

4. The alleged violation of Section 8(a)(5) and the requested bargaining order

As previously found, on October 19, 1981, when the Union requested recognition, at least 43 of the 66 employees then in the unit had executed operative union cards. However, of these 43 card-signers, 9 had been discharged on the previous day, October 18, to discourage union activity; and later that month, the Respondent discharged 2 more card-signers (including DiPonziano, whose card has not been counted) for the same reason. Moreover, 2 days after the Union requested recognition, the Respondent engaged in additional unlawful efforts to keep the Union out of the Respondent's establishment by soliciting complaints and grievances from waiter DiCintio, promising to remedy them, and promising to give the waiters anything they wanted.

In short, the Respondent has engaged in unfair labor practices which have the tendency to undermine majority strength and impede the election process. Under such circumstances, an 8(a)(5) finding and a bargaining order should issue if the possibility of erasing the effects of such unfair labor practices and insuring a fair election by the use of traditional remedies is slight and employee sentiment would, on balance, be better protected by a bargaining order. Among the factors material in making such a determination are the extensiveness of the employer's unfair labor practices in terms of their past effect on election conditions, the likelihood of their recurrence in the future, whether the employer has taken affirmative rectifying measures, and the likelihood that compliance with a remedial order which does not include a bargaining order would erase from the employees' memories the coercive effect of the unfair labor practices sought to be so remedied. *Gissel Packing*, supra, 395 U.S. at 613–615; *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 518–521 (3d Cir. 1981); *NLRB v. Armcor Industries*, 535 F.2d 239, 244 (3d Cir. 1976); *NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 945–946 (3d Cir. 1980); *Eastern Steel Co.*, 253 NLRB 1230, 1240–41 (1981), enfd. 671 F.2d 104 (3d Cir. 1982); *Daybreak Lodge Nursing Home*, 230 NLRB 800, 804–805 (1977), enfd. 585 F.2d 79 (3d Cir. 1978); *Chandler Motors*, 236 NLRB 1565 (1978). On the basis of these standards, I conclude that an 8(a)(5) finding and a bargaining order should issue here.

As found above, the Respondent discriminatorily discharged 10 signers of operative cards and an 11th cardsigner. The discriminatees comprised one-fourth of the card-signers, the employees who had begun the union drive, and several employees who had successfully solicited cards from others as well as signing cards on their own behalf. Such discharges are about the most severe punishment that an employer can inflict for union activity, and the coercive impact on employees of a consequent sudden loss of income cannot be completely undone by Board-compelled or judicially compelled reinstatement and backpay months or years later. Accordingly, such discharges constitute "a most flagrant means of dissuasion" (*Eastern Steel*, supra, 671 F.2d 104); thus, the discharges led the Peacock Room waiters and employees at the October 26 union meeting to fear that they would be discharged too. The discharges' coercive effect on other employees in the instant case was likely aggravated by the fact that all 11 of the discriminatees were admittedly good workers—in other words, any remaining employees who chose to engage in union activity would be unlikely to take comfort in their own good work records.

Moreover, I think it unlikely that the coercive impact of these discharges would be negated by a cease-and-desist order, reinstatement offers and backpay to the dis-

criminatees many months after their discharge,[38] and a notice to the employees that such action has been taken and the Respondent will in the future respect employees' organizational rights. Rather, the 11 discriminatory discharges and the Respondent's promise of benefits for antiunion activity lead me to conclude that the damage to the employees' ability to exercise a free choice has already been done (see *Gissel*, supra, 395 U.S. at 612), even assuming that the Respondent does not resume its unfair labor practices. See *Eastern Steel*, supra, 671 F.2d 104; *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). Furthermore, the unlawful discharge decision was made primarily by the Respondent's owner/directors, whose identity has not changed. Although DeAngelo has resigned as food and beverage manager, as of the April 1982 10(j) hearing his wife occupied the post of banquet manager, who was the immediate supervisor of all the discriminatees except the part-time bartenders. The Respondent's employees likely believed that the Respondent discharged 11 employees for union activity in the awareness that the Respondent was thereby exposing itself to liability for reinstatement and backpay. I think it unlikely that the addition of a cease-and-desist and notice-posting order would be sufficient to wholly reassure employees that they could thereafter engage in union activity without running the risk of at least a temporary loss of employment and income.[39]

Moreover, the district court's August 1982 reinstatement order aside, there is no evidence that the Respondent has ever taken any rectifying measures. On the contrary, on learning from waiter DiCintio that the discharges had had their natural effect of leading the Peacock Room waiters to fear for their own jobs, the Respondent solicited and promised to rectify their grievances and promised to give them anything else they wanted, on the implied condition that DiCintio use his leadership role to keep the Union out. Furthermore, when hiring part-time bartenders after the unlawful discharge of the part-time bartenders named in the complaint, the Respondent did not (so far as the record shows) offer work to any of these dischargees, even though they were admittedly good workers with up to 11 years of service and the only reason the Respondent has tendered to me for their discharge is an alleged decision to use full-time bartenders only.

In view of the foregoing, I conclude that employee sentiment would be better protected by an 8(a)(5) finding and bargaining order than by a cease-and-desist, reinstatement/backpay, and notice-posting order alone. Because the Union requested bargaining after the unlawful discharges began, and all of the Respondent's unfair labor practices are remedied by this Order, the Respondent's bargaining obligation is found to have arisen on October 19, 1981, the date of the Union's bargaining demand. *Justak Bros.*, supra, 253 NLRB 1054 fn. 3 (1981).

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) of the Act by soliciting its employees' complaints and grievances and promising improved working conditions in order to discourage the employees' support of the Union.

4. The Respondent has violated Section 8(a)(3) and (1) of the Act by discharging the following employees to discourage union activity: Robert Burrough, Paul DiPonziano, Thomas Gruber, Ingrid Hendriks, Mona Komine, Susan LaBounty, John Milchanoski, John Rajczy, Cindee Rees, Caryll Tighe, and Kathleen Walker.

5. The following employees of the Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All waiters, waitresses, bartenders, dishwashers, pantry employees, cooks, busboys, cashiers, stewards and banquet employees including banquet maitre d' hotel, steady extras and hostesses employed by Respondent at Tall Pines Inn; but excluding guards and supervisors as defined in the Act.

6. The Union has been at all times on and after October 19, 1981, the designated collective-bargaining representative of the employees in said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

7. The Respondent has violated Section 8(a)(5) of the Act by refusing on and after October 19, 1981, to recognize the Union as the representative of the employees in the foregoing unit.

8. The unfair labor practices set forth in paragraphs 3, 4, and 7 affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. The strike begun among the Respondent's employees on October 27, 1981, was an unfair labor practice strike from its inception.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that the Respondent be required to cease and desist therefrom. Such unfair labor practices include the discriminatory discharge of 11 employees, which discharges were decid-

[38] The district court's reinstatement order issued about 10 months after the discharges. The court did not order any backpay.

[39] As the Court of Appeals for the District of Columbia Circuit pointed out in *Oil Workers v. NLRB*, 445 F.2d 237, 245 (1971), cert. denied 404 U.S. 1039 (1972):

> [N]et back pay is always inadequate because it can never make a discharged employee whole. This is so because the remedy fails to take into account such factors as inflation, the humiliation of being fired, and the frustration of searching for another job. Furthermore, the 6 percent interest allowed [but see *Florida Steel Corp.*, 231 NLRB 651 (1977)] fails to recoup the interest that a discharged employee might have been forced to pay on money borrowed to sustain himself and his family during the period of joblessness. Nor does net back pay make allowance for such intangibles as the loss of credit occasioned by the dischargee's inability to maintain payments on debts incurred prior to his discharge. . . . An employee who knows that the Board's actions will not fully protect him in the event of an unlawful discharge will be, to that extent, reluctant to assert his rights in their fullest range.

ed on by the Respondent's owner/directors and, in order to discourage union support, the president/owner/-director's solicitation of employee grievances and promise of improved working conditions. I conclude that, unless restrained, the Respondent is likely to engage in continuing and varying efforts in the future to prevent its employees from exercising their rights under Section 7 of the Act. Accordingly, the Respondent will be required to refrain from in any other manner infringing on such rights. *NLRB v. Express Publishing Co.*, 312 U.S. 426, 437–439 (1941); *NLRB v. Southern Transport*, 434 F.2d 559, 561 (8th Cir. 1965); *Hickmott Foods*, 242 NLRB 1357 (1979).

Affirmatively, the Respondent will be required (if it has not already done so) to offer the discriminatorily discharged employees immediate reinstatement to the jobs of which they were unlawfully deprived or if such jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and to make them whole for any loss of earnings they may have suffered by reason of the discrimination against them. Such earnings shall include tips and gratuities. *Phelps Dodge v. NLRB*, 313 U.S. 177, 198 fn. 7 (1941). In addition, the undischarged employees who participated in the strike caused by the Respondent's unfair labor practices shall, on their application for reinstatement, be offered reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without impairment of their seniority and other rights and privileges, dismissing, if necessary, any persons hired as replacements on or after October 27, 1981. If after such dismissals, there are insufficient positions remaining for all of the striking employees who desire reinstatement, the available positions shall be distributed among them, without discrimination because of their union membership or activities or participation in the strike, in accordance with seniority or such other nondiscriminatory practices as have been applied in the past by the Respondent in the conduct of its business. Those strikers for whom no employment is immediately available after such distribution shall be placed on a preferential hiring list with priority determined among them by seniority or other nondiscriminatory practices and, thereafter, in accordance with such system, they shall be offered reinstatement as positions become available and before other persons are hired for such work. Such striking employees shall be made whole for any loss of earnings (including tips and gratuities) they may have suffered or may suffer by reason of the Respondent's refusal, if any, to reinstate them by payment to each of a sum of money equal to that which he or she would have earned during the period from 5 days after the date on which he or she applied, or shall apply, for reinstatement to the date of the Respondent's offer of reinstatement, absent a lawful justification for the Respondent's failure to make such an offer. *Joe & Dodie's Tavern*, 254 NLRB 401 (1981). Backpay and interest thereon for the dischargees and the striking employees shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel*, supra, 231 NLRB 651.[40]

[40] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Also, the Respondent will be required to remove from its files any reference to the unlawful discharges, and notify the dischargees in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel action against them. *Sterling Sugars*, 261 NLRB 472 (1982). In addition, the Respondent will be required to bargain with the Union on request, and to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER[41]

The Respondent, Tall Pines Inn, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employees' complaints and grievances, and promising improved working conditions, in order to discourage membership in Hotel and Restaurant Employees & Bartenders International Union, Local 54, AFL–CIO, or any other labor organization.

(b) Discouraging any employee, or otherwise discriminating against any employee with regard to his hire or tenure of employment or any other term or condition of employment, to discourage membership in the Union or any other labor organization.

(c) Refusing to recognize and bargain collectively with the Union as the exclusive representative of the following appropriate unit of the Respondent's employees:

> All waiters, waitresses, bartenders, dishwashers, pantry employees, cooks, busboys, cashiers, stewards and banquet employees including banquet maitre d' hotel, steady extras and hostesses employed by Respondent at Tall Pines Inn; but excluding guards and supervisors as defined in the Act.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer (if the Respondent has not already done so) the following employees immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered by reasons of the discrimination against them in conformity with the section of this decision entitled "The Remedy": Robert Burrough, Paul DiPonziano, Thomas Gruber, Ingrid Hendriks, Mona Komine, Susan LaBounty, John Milchanoski, John Rajczy, Cindee Rees, Caryll Tighe, and Kathleen Walker.

(b) Upon application of the undischarged employees who participated in the strike which began on October

[41] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

27, 1981, and who have not already been reinstated, offer full and immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any persons hired as replacements on or after October 27, 1981. If, after such dismissals, sufficient jobs are not available for these employees, they shall be placed in a preferential hiring list in accordance with their seniority or other nondiscriminatory practice utilized by the Respondent, and they shall be offered employment before any other persons are hired. Make whole these employees for any loss of earnings they may have suffered or may suffer by reason of the Respondent's refusal, if any, to offer them reinstatement, in the manner set forth in the section of this decision entitled "The Remedy."

(c) On request, recognize and bargain with the Union as the exclusive representative of the employees in the appropriate unit, and embody in a signed agreement any agreement reached.

(d) Expunge from its files any reference to the unlawful discharges, and notify the unlawfully discharged employees in writing that this has been done and that evidence of the unlawful discharges will not be used as a basis for future personnel actions against them.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary or useful for analyzing and computing the amount of backpay due under the terms of this Order.

(f) Post at its Sewell, New Jersey facility copies of the attached notice marked "Appendix D."[42] Copies of said notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[42] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

Employees admittedly in unit on October 19, 1981

Adair, Greg (G.C. Exh. 1)
Aldrich, Karen (G.C. Exh. 2)
Altbaum, Owen (G.C. Exh. 3)
Barber, Margaret
Barbone, Stephen
Bittner, Anne
Bonney, Donald (G.C. Exh. 5)
Brennan, Harry (G.C. Exh. 6)
Cargill, James, Jr. (G.C. Exh. 8)
Catalano, Andrew (G.C. Exh. 9)
Cromley, Louann (G.C. Exh. 10)
Crumley, Howard
DeMore, Terry
DiCintio, Joseph (G.C. Exh. 11)
Donaldson, Kathleen
Dornisch, John
Eldredge, Sherri
Eshelman, Robert (G.C. Exh. 13)
German, Joan
Gilham, Jeff (G.C. Exh. 14)
Grossman, Gary S. (G.C. Exh. 15)
Gruber, F. Cheryl
Hayden, Matthew (G.C. Exh. 16)
Jones, James O. (G.C. Exh. 18)
Jones, Santa Maria (G.C. Exh. 19)
Karper, Lawrence
Keane, Joseph M. (G.C. Exh. 20)
Klimanskis, Inta (G.C. Exh. 21)
Landolfi, Terri
LaBounty, Susan (G.C. Exh. 23)
Larmer, Kathy (G.C. Exh. 24)
Lightfoot, Charles
Locatelli, Stephen (G.C. Exh. 25)
Markert, Allyn, Jr. (G.C. Exh. 26)
McClintock, Joseph (G.C. Exh. 27)
McGuire, John
McIlvaine, Alfred
Pagano, James (G.C. Exh. 28)
Patton, William (G.C. Exh. 29)
Pavone, Mario (G.C. Exh. 30)
Polke, Frank (G.C. Exh. 31)
Reser, Greg (G.C. Exh. 34)
Ruberto, Livorno
Saul, Ida
Sergeiko, John (G.C. Exh. 35)
Simone, Matthew (G.C. Exh. 36)
Springer, Deborah
Stewart, Blair
Stowe, William
Toms, Robert (G.C. Exh. 38)
Troxell, Bob
Turton, Francis (G.C. Exh. 39)
Uhl, Fredric (G.C. Exh. 40)
Vaccarino, Elizabeth (G.C. Exh. 41)
Walker, Agnes (G.C. Exh. 42)

APPENDIX B

Employees in unit on October 19, 1981, because discharged on October 18, 1981, for union activity

Burrough, Robert (G.C. Exh. 7)
Gruber, Thomas (G.C. Exh. 45)
Hendriks, Ingrid (G.C. Exh. 17)
Komine, Mona (G.C. Exh. 22)
Rajczy, John (G.C. Exh. 32)
Rees, Cindee (G.C. Exh. 33)
Tighe, Caryll (G.C. Exh. 37)
Walker, Kathleen (G.C. Exh. 42)

APPENDIX C

Other employees in unit on October 19, 1981

DiPonziano, Paul (G.C. Exh. 12)
Milchanoski, John (G.C. Exh. 44)[1]
Witt, Frances Ann

[1] Card not counted.

APPENDIX D

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection.
To refrain from the exercise of any or all such activities.

WE WILL NOT solicit your complaints and grievances and promise improved working conditions in order to discourage your support of Hotel and Restaurant Employees & Bartenders International Union, Local 54, AFL-CIO, or any other union.

WE WILL NOT discharge or otherwise discriminate against you with regard to your hire or tenure of employment or any term or condition of employment to discourage membership in Local 54 or any other union.

WE WILL NOT refuse to recognize and bargain collectively with Local 54 as the exclusive representative of the following appropriate unit:

All waiters, waitresses, bartenders, dishwashers, pantry employees, cooks, busboys, cashiers, stewards and banquet employees, including banquet maitre d' hotel, steady extras and hostesses, but excluding guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you under Section 7 of the Act.

WE WILL (if we have not already done so) offer the following employees reinstatement to their old jobs or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed. WE WILL make them whole, with interest, for any loss of pay (including tips and gratuities), resulting from their discharge:

Robert Burrough	John Milchanoski
Paul DiPonziano	John Rajczy
Thomas Gruber	Cindee Rees
Ingrid Hendriks	Caryll Tighe
Mona Komine	Kathleen Walker
Susan LaBounty	

WE WILL remove from our files any reference to these discharges, and notify these employees in writing that this has been done and that evidence of these discharges will not be used as a basis for future personnel action against these employees.

WE WILL, on application, offer immediate and full reinstatement to all undischarged employees who participated in the strike on or after October 27, 1981, and who have not already been reinstated, to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges, dismissing if necessary, any person hired by us on or after October 27, 1981. If insufficient jobs are available for these employees, they shall be placed on a preferential hiring list, and they will be offered employment before any other persons are hired. If we do not reinstate the striking employees in the manner set forth above within 5 days from the date reinstatement is requested, backpay (including tips and gratuities), with interest, shall begin running from the date on which the 5 days expire.

WE WILL, on request, recognize and bargain with the Union as the exclusive representative of the employees in the appropriate unit, and embody in a signed agreement any agreement reached.

TALL PINES INN, INC.